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Pennsylvania Waiver Doctrine in Criminal Proceedings: Its Application and Relationship to the Ineffective Assistance of Counsel Claim

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Comments

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I. INTRODUCTION

It has long been the general rule that a reviewing court will only consider those issues properly preserved below.[1] However, Pennsylvania's fundamental error doctrine was a major exception to this general rule; appellate courts would reverse on the basis of an unpreserved point if it constituted fundamental error.[2] In *Commonwealth v. Clair*,[3] the Supreme Court of Pennsylvania eliminated the fundamental error doctrine in the criminal area,[4] by essentially holding that every issue must be preserved for review by a timely and specific allegation of error. The court reasoned that the refusal to review unpreserved errors which might have deprived the defendant of due process would not deny him a fair trial since such errors could be remedied by a claim of ineffective assistance of counsel.[5] The waiver doctrine enunciated in *Clair* appears to be a simple rule, capable of easy administration. Its subsequent interpretation and application have proven otherwise. The precepts of the rule are often unclear; specific becomes vague, timely seems uncer-

1. *See* Commonwealth v. Kahn, 116 Pa. Super. 28, 176 A. 242 (1935) (stating the general rule that a conviction will not be reversed where alleged error was not raised in the court below). *See also* Commonwealth v. Agie, 449 Pa. 187, 296 A.2d 741 (1972) (issues not raised at trial or in post-trial motions are waived and will not be considered on appeal); Commonwealth v. Razmus, 210 Pa. 609, 60 A. 264 (1905) (alleged error will not be considered on appeal if trial counsel failed to call the trial judge's attention to it); Commonwealth v. Hilbert, 190 Pa. Super. 602, 155 A.2d 212 (1959) (objection to trial court's charge generally cannot be made for the first time on appeal). *See generally* Note, *Operation of Appellate Procedure in Pennsylvania Criminal Cases*, 100 U. PA. L. REV. 868 (1952) [hereinafter cited as PENNSYLVANIA Note].

2. *See, e.g.*, Commonwealth v. Williams, 432 Pa. 557, 563-67, 248 A.2d 301, 304-06 (1968), and cases cited therein. For a detailed discussion of the general rule and the fundamental error exception see Note, *Appeal of Errors in the Absence of Objection—Pennsylvania's "Fundamental Error" Doctrine*, 73 DICK. L. REV. 496 (1968) [hereinafter cited as DICKINSON Note].

3. 458 Pa. 418, 326 A.2d 272 (1974).

4. *Id.* at 423, 326 A.2d at 274.

5. *Id.* at 422, 326 A.2d at 274.

tain, and ineffective assistance of counsel frequently resembles fundamental error. The purpose of this comment is to examine the actual effect that *Clair*'s waiver rule has had on criminal procedure in Pennsylvania,[6] and to determine its current and future viability. To accomplish this, it is necessary to explore the requirements for preserving an issue for review on its merits, the exceptions to the waiver rule, and, perhaps most importantly, the judicial analysis and disposition of ineffective assistance claims grounded upon counsel's failure to comply with *Clair*. A discussion of the general nature of fundamental error and the principles and rationale of *Clair* will facilitate an understanding of this subject.

II. General Background

The primary reason for applying the fundamental error doctrine in criminal cases was that a person should not be deprived of life or liberty because of his counsel's carelessness in failing to preserve an issue.[7] Despite the laudable objectives of the doctrine, it was subjected to justified criticism on several grounds.[8] Perhaps its most serious deficiency was that it lacked a concrete definition,[9] thereby causing inconsistent applications and unpredictable results. This point was cogently demonstrated by the Pennsylvania Supreme Court when, in separate opinions written the same day, it held that

6. It should be made clear at the outset that *Clair*'s waiver rule is not strictly applied at less than formal hearings. For example, it has been held that failure to assert a denial of due process at a probation revocation hearing did not preclude raising the claim on appeal. *See, e.g.*, Commonwealth v. Stratton, 235 Pa. Super. 566, 344 A.2d 636 (1975); Commonwealth v. Alexander, 232 Pa. Super. 57, 331 A.2d 836 (1974). *See also* Commonwealth v. Kile, 237 Pa. Super. 72, 346 A.2d 793 (1975) (failure to raise denial of due process issue at parole revocation hearing did not preclude appellant from making the claim on appeal).

7. Commonwealth v. O'Brien, 312 Pa. 543, 546, 168 A. 244, 245 (1933). For additional cases applying this rationale see Dickinson Note, *supra* note 2, at 500 n.24.

8. *See generally* Note, *Basic and Fundamental Error: The Right Result for the Wrong Reason*, 43 Temp. L.Q. 228 (1970) [hereinafter cited as Temple Note]. *See also* Dickinson Note, *supra* note 2, at 500-01.

9. The definition of the type of error which caused the doctrine to be invoked varied from case to case. *See, e.g.*, Commonwealth v. Williams, 432 Pa. 557, 563-64, 248 A.2d 301, 304 (1968) (error which affects the merits or justice of the case); Commonwealth v. Scoleri, 432 Pa. 571, 579, 248 A.2d 295, 299 (1968) (errors of such substance and prejudice which result in an unfair trial and a deprivation of justice); Commonwealth v. O'Brien, 312 Pa. 543, 546, 168 A. 244, 245 (1933) (palpable error); Knapp v. Griffin, 140 Pa. 604, 616, 21 A. 449, 450 (1891) (serious error); Commonwealth v. Mays, 182 Pa. Super. 130, 132, 126 A.2d 530, 531 (1956) (extraordinary circumstances); Commonwealth v. Bird, 152 Pa. Super. 648, 33 A.2d 531 (1943) (error which offends the fundamentals of a fair and impartial trial).

error in the jury charge was fundamental,[10] but the denial of a sixth amendment right[11] was not.[12] The absence of uniform criteria to determine fundamental error inevitably resulted in ad hoc decision-making by the courts.[13]

The unpredictability engendered by inconsistent court decisions encouraged the raising of meritless allegations on appeal,[14] which, in conjunction with the elimination of cost as an obstacle to criminal appellate review,[15] the common desire of defendants to appeal adverse verdicts, and the requirement that counsel raise by appeal any legal points arguable on their merits,[16] produced a greater number of appeals.[17] Since in Pennsylvania it was not clear precisely what

10. Commonwealth v. Williams, 432 Pa. 557, 248 A.2d 301 (1968) (error in the trial court's charge defining "beyond a reasonable doubt" was fundamental and considered on appeal even though no objection was made below).

11. Commonwealth v. Scoleri, 432 Pa. 571, 248 A.2d 295 (1968) (claim that court's refusal to allow defendant to confer with counsel during recess denied him the effective assistance of counsel was waived because not raised below).

12. Justice Roberts commented: "Examining these two cases provides a shocking contrast—denial of a constitutional right is *not* fundamental (*Scoleri*) but an error in a charge is (*Williams*)." 432 Pa. at 583, 248 A.2d at 300 (concurring opinion) (emphasis in original). Justice Roberts added that he felt the test for fundamental error was so vague that it could result in denying evenhanded administration of justice. *Id.* at 583, 248 A.2d at 301. *Cf.* Commonwealth v. Ewell, 456 Pa. 589, 319 A.2d 153 (1974); Commonwealth v. Watlington, 452 Pa. 524, 306 A.2d 892 (1973). In *Watlington,* the court held that PA. R. CRIM. P. 1119(b) precluded an allegation on appeal that the trial court's jury charge was erroneous in the absence of a specific objection. 452 Pa. at 526, 306 A.2d at 893. In contrast, *Ewell,* a case decided subsequent to *Watlington,* held that rule 1119(b) did not foreclose appellate consideration of an erroneous jury charge when no objection was made at trial. 456 Pa. at 596 n.6, 319 A.2d at 157 n.6.

13. The absence of uniform criteria caused at least one writer to declare that fundamental error is simply what the particular court deciding the issue says that it is. *See* DICKINSON Note, *supra* note 2, at 501. For other commentary on the courts' imprecision in determining what is fundamental error see TEMPLE Note, *supra* note 8, at 229. *See also* Commonwealth v. Clair, 458 Pa. 418, 421, 326 A.2d 272, 273 (1974). ("The test is merely a vehicle whereby the Court can arbitrarily reverse on an otherwise unpreserved issue"); Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 257, 322 A.2d 114, 116 (1974) (fundamental error "has remained essentially a vehicle for reversal when the predilections of a majority of an appellate court are offended").

14. 458 Pa. at 421, 326 A.2d at 273.

15. *See* Douglas v. California, 372 U.S. 353 (1963) (where right to appeal exists, the state must guarantee the right to assistance of counsel on direct appeal from a felony conviction).

16. *See* Anders v. California, 386 U.S. 738, 744 (1967) (indigent defendant has right to assistance of counsel on appeal if any legal points, not frivolous, exist on which to base the appeal); Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968) (expressly adopting the *Anders* holding for Pennsylvania). It was recently stated that *Anders* and *Baker* require counsel to thoroughly examine the record and determine whether his client's appeal is wholly frivolous before being permitted to withdraw. Lack of merit is not the legal equivalent of frivolity. Commonwealth v. Johnson, 363 A.2d 1223, 1225 (Pa. Super. 1976).

17. For a general discussion of the increase in the number of criminal appeals being taken

constituted fundamental error, nearly all unpreserved errors were arguably fundamental.[18] Counsel, confronted with a defendant demanding that an appeal be taken from sentence, merely had to scan the record for imperfections in the trial proceedings and allege that any he found constituted fundamental error. Regardless of how trifling the error was, or whether it had been addressed at trial, the appellate court would have to make at least a cursory examination of the merits of the claim to determine if it amounted to fundamental error. Fundamental error became a boilerplate claim in appellate briefs, and, although such allegations were rarely successful, they severely taxed the time and efforts of the appellate courts.[19]

It was against this judicial background that *Clair* was decided. In that case, the appellant, who had not objected at trial to the jury charge, claimed on appeal that the trial court had committed basic and fundamental error in its charge to the jury.[20] In holding that allegations of fundamental error would no longer enable parties to raise unpreserved issues on criminal appeals, the court adopted the reasoning of *Dilliplaine v. Lehigh Valley Trust Co.*,[21] which had abolished the doctrine in civil cases.[22] The *Clair* court stated that abolition of the doctrine would assure that:

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see Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701 (1972). An excellent analysis of the tension which exists between the expansion of criminal defendant's rights and the increasing need for judicial economy is found in Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U.L. REV. 653 (1971) [hereinafter cited as Bazelon].

18. Because of the diversity which existed among the Pennsylvania decisions concerning what exactly was fundamental error, an argument could be made that *Anders* required counsel to nearly always allege that unpreserved error was fundamental. It was difficult to conclude, in light of the uncertainty in then-existing case law, that a claim that an unpreserved error was fundamental would be considered wholly frivolous. However, it is doubtful that attorneys needed any prompting to raise such claims.

19. *See* 458 Pa. at 421-22, 326 A.2d at 273-74.

20. Specifically, the appellant claimed that the trial judge in his charge had invaded the province of the jury, prejudiced the appellant when reviewing the testimony, and erroneously instructed the jury on second degree murder. *Id.* at 420, 326 A.2d at 273. The court stated that the failure to object before the jury retired to deliberate contravened PA. R. CRIM. P. 1119(b), thereby precluding appellate review of the claim. Prior to this ruling, a violation of rule 1119(b) did not necessarily preclude appellate review of the claim. *See* Commonwealth v. Jennings, 442 Pa. 18, 274 A.2d 767 (1971) (rule 1119(b) does not preclude the court from considering an unpreserved error in the jury charge alleged to be fundamental). *See also* note 12 *supra*.

21. 457 Pa. 255, 322 A.2d 114 (1974).

22. The court held that failure to make a specific objection to erroneous jury instructions in civil cases waived the claim on appeal, regardless of how fundamental the error. *Id.* at 260, 322 A.2d at 117.

> (1) Appellate courts will not be required to expend time and energy . . . where no trial ruling has been made. (2) The trial court may promptly correct the asserted error. [T]he trial court is more likely to reach a satisfactory result thus obviating the need for appellate review. . . . (3) Appellate courts will be free to more expeditiously dispose of the issues properly preserved for appeal. Finally, the exception requirement will remove the advantage formerly enjoyed by the unprepared trial lawyer who looked to the appellate court to compensate for his trial omissions.[23]

In addition, the court noted that abrogation of the doctrine in the criminal area was even more justifiable than in the civil area, "since any error that deprives a defendant of due process can more properly be remedied by a claim of ineffective assistance of counsel."[24] Despite a strong dissent,[25] the majority felt that by abrogating the fundamental error doctrine and suggesting that a claim of ineffectiveness was an appropriate remedial device, judicial economy[26] would be increased without diminishing the protection afforded defendants' rights.[27]

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23. 458 Pa. at 421-22, 326 A.2d at 273-74, *quoting* Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 259, 322 A.2d 114, 116-17 (1974).

24. 458 Pa. at 422, 326 A.2d at 274.

25. *Id.* at 423, 326 A.2d at 274 (Pomeroy, J., dissenting).

26. Justice Pomeroy felt that *Clair* would not promote judicial economy since it would merely cause an increase in the number of ineffectiveness claims. *Id.* at 424, 326 A.2d at 275 (dissenting opinion). He took a similar position in *Dilliplaine*, stating that unpreserved errors which were precluded from appellate review would be "almost certain to resurface . . . in the form of a charge of ineffectiveness of counsel." 457 Pa. at 263, 322 A.2d at 119 (dissenting opinion).

27. 458 Pa. at 423, 326 A.2d at 274 (Pomeroy, J., dissenting). Justice Pomeroy stressed that *Dilliplaine*'s rationale was inapposite to criminal cases where the rights involved were incalculably greater than those involved in civil litigation. He stated: "While . . . it is never proper to think of our advocacy system merely as a game to be won or lost according to how well the players know the rules, there is less room for such thinking in the criminal area than anywhere else in the law." *Id.* at 423-24, 326 A.2d at 275. *See also* 13 DUQ. L. REV. 992, 998 (1975) (interest of liberty involved in criminal case demands greater protection than pecuniary interests involved in civil case).

There has also been more recent criticism regarding the efficacy of substituting the ineffectiveness claim for a claim of fundamental error as a method of dealing with unpreserved issues. *See* Commonwealth v. Krall, 360 A.2d 691 (Pa. Super. 1976). In *Krall*, the court was constrained by the waiver doctrine to affirm the defendant's conviction. Judge Hoffman concurred because the waiver doctrine required the result reached by the majority, but he observed that the case demonstrated a need for the flexibility provided by the fundamental error doctrine. He explained that any adverse effect the fundamental error doctrine had on judicial economy would be outweighed by the increased ability of the courts to mete out

Although *Clair* dealt primarily with error in the jury charge,[28] the scope of its application was quickly expanded to encompass all unpreserved errors,[29] even those of constitutional dimensions.[30] The result has been that nearly all unpreserved allegations of error,[31] regardless of the context of the proceeding in which they arose, or how fundamental their nature, have been precluded from further consideration by the courts. The defendant may, however, still seek

justice. Judge Hoffman viewed the waiver doctrine as based on sound principles, but felt that its present stringent application unduly restricted the courts. *Id.* at 691, 692 (concurring opinion). *See also* 13 DUQ. L. REV. 992, 1000 (1975), stating that there would be no difference in the manner such claims were treated under the ineffectiveness inquiry than under the fundamental error test. In 36 U. PITT. L. REV. 933 (1975), the writer suggests that the ineffectiveness approach would not remedy the defects inherent in the fundamental error test. According to the author, the deliberate abuses of the rule by counsel would still occur, performance of public defenders would not be improved, and the number of appeals would not be reduced. *Id.* at 941-43.

28. The *Clair* court held that PA. R. CRIM. P. 1119(b) precluded appellate consideration of the claim. This rule generally provides that no claim that the charge was erroneous may be made unless specific objections are made prior to the time the jury retires to deliberate. Prior to *Clair*, rule 1119(b) did not prevent appellate consideration of errors in the jury charge which had not been properly preserved. *See* note 12 *supra.* After *Clair* the courts strictly construed the rule. *See, e.g.*, Commonwealth v. Corkan, 354 A.2d 537 (Pa. 1976) (failure to instruct the jury that psychiatric evidence could be considered to negate specific intent could not be raised on appeal); Commonwealth v. Johnson, 460 Pa. 493, 333 A.2d 881 (1975) (waiver of claim that trial court erroneously omitted voluntary manslaughter charge); Commonwealth v. Dukes, 460 Pa. 180, 331 A.2d 478 (1975) (appellate court would not consider allegation that charge on the presumption of innocence was erroneous when not raised below).

29. At first, the full extent of *Clair*'s application was not certain since it dealt primarily with issues involving error in the trial court's charge, and *Dilliplaine* dealt solely with such issues. *See* 36 U. PITT. L. REV. 933, 946-47. Perhaps this uncertainty was not justified; *Clair* indicated the future scope of its application in holding that its reasoning was equally pertinent to unpreserved error relating to testimony arising during trial. 458 Pa. at 422, 326 A.2d at 274.

30. The courts have held waived a wide variety of claims based on alleged constitutional violations. *See, e.g.*, Commonwealth v. Bryant, 461 Pa. 309, 336 A.2d 300 (1975) (arrest claimed to have violated the fourth amendment); Commonwealth v. Sistrunk, 460 Pa. 655, 334 A.2d 280 (1975) (denial of due process); Commonwealth v. Piper, 458 Pa. 307, 328 A.2d 845 (1974) (defendant sentenced under statute which violated equal protection clause); Commonwealth v. Powell, 459 Pa. 253, 328 A.2d 507 (1974) (denial of sixth amendment right to compulsory process); Commonwealth v. Roundtree, 458 Pa. 351, 326 A.2d 285 (1974) (waiver of right to speedy trial).

A state evidentiary rule that federal constitutional errors may be waived is not in itself violative of the United States Constitution. Estelle v. Williams, 425 U.S. 501, 508 n.3 (1976) (defendant's failure to object at trial to being compelled to stand trial in prison garb, in violation of the fourteenth amendment, negated the presence of compulsion necessary to establish a constitutional violation).

31. There are exceptions to the waiver doctrine. *See* notes 94-116 and accompanying text *infra.*

relief by claiming that counsel was ineffective in failing to preserve the allegation.[32] But the defendant's chance for successful relief is more remote when he must rely on an ineffectiveness claim than when he secures direct review of the issue by properly preserving it initially. This is so because direct review of an issue involves only an inquiry into whether the issue amounts to reversible error. In determining an ineffectiveness claim predicated on counsel's failure to preserve an issue, the court will grant relief only if the issue constitutes reversible error and it is shown that counsel had no reasonable basis for failing to preserve that issue.[33] Because of the harm which may result from a failure to preserve an issue, it is important to determine exactly what action is necessary to secure direct review of an issue and avoid the application of *Clair*'s waiver rule.

III. Specificity and Timeliness

While it is now settled that an issue must be preserved at every stage of the proceeding by a specific and timely allegation of error if it is to be directly considered at any later stage of review,[34] it is not always apparent what is necessary to meet these requisites. Although the two general requirements of specificity and timeliness are not novel to the law, their construction since *Clair* makes a re-examination of the principles appropriate.

A. Specificity

1. Specificity of Form

In considering specificity, it is necessary to distinguish between the specificity demanded in the form of the action and that required in the statement of the grounds. Specificity of form refers to the

32. The defendant can claim that counsel was incompetent in failing to properly preserve a claim for direct review on its merits. *See* notes 162-80 and accompanying text *infra*.

33. For a discussion of the courts' present analysis of ineffectiveness claims grounded on counsel's failure to preserve a claim for direct review see notes 181-203 and accompanying text *infra*.

34. Commonwealth v. Bronaugh, 459 Pa. 634, 331 A.2d 171 (1975). *See, e.g.*, Commonwealth v. Hilton, 461 Pa. 93, 334 A.2d 648 (1975); Commonwealth v. Reid, 458 Pa. 357, 326 A.2d 267 (1974).

manner in which the action is taken.[35] Two approaches to this issue have been adopted by the courts. A traditional, form-oriented approach reviews the specific action taken, while an effect-oriented approach examines whether the action taken was sufficient to alert the court to the error.[36] Thus far, the Pennsylvania courts have vacillated between effect- and form-oriented approaches.[37] For example, although the courts have frequently stated that a specific objection or exception is necessary to preserve an error in the jury charge,[38] it has been held that where a point for charge is offered and rejected, counsel need not take further action to preserve the issue.[39] Underlying this rule is the reasoning that the trial judge has been fully alerted to the issue and it would be senseless to require further action by counsel simply to comport with form. However, the courts often ignore the effect of counsel's action, as illustrated by a recent decision which announced that when a point for charge has been refused, failure to object or take an exception precludes a claim on appeal that the refusal was erroneous.[40] Examples of such myopic preoccupation with form also exist in the context of other types of error. In *Commonwealth v. Frazier*,[41] the court held counsel's failure to object or except when the trial judge sustained the opposing party's objection to his cross-examination waived any claim that the ruling was erroneous. The illogic of requiring an exception in this circumstance was pointed out in a concurring opinion,[42] which reasoned that the opponent's objection to the question was sufficient to alert the trial court to the issue, and a requirement of further

35. "Grounds," on the other hand, refers to the underlying theory supporting the allegation. *See* notes 57-69 and accompanying text *infra*.

36. An effect-oriented approach is functional in nature. It ignores the type of action taken by counsel, and centers its inquiry on whether counsel's action has provided the judge with an opportunity to address the underlying issue.

37. It should be pointed out that a strict application of the waiver rule, regardless of the approach taken, will not always enhance judicial economy. *See* notes 162-80 and accompanying text *infra*. The waived issue will likely be presented to the court in the context of an ineffective assistance of counsel claim. *See* note 44 *infra*.

38. *See* note 28 *supra*.

39. Commonwealth v. Williams, 463 Pa. 370, 373 n.1, 344 A.2d 877, 879 n.1 (1975). *But cf.* PA. R. CRIM. P. 1115(a)-(b). Generally, rule 1115(a) states that any determination by the judge on an objection or motion relieves the party adversely affected of the duty of taking further action to preserve the claim. However, rule 1115(b) expressly makes rule 1115(a) inapplicable to the jury charge.

40. Commonwealth v. Culberson, 458 A.2d 416, 418-19 (Pa. 1976).

41. 359 A.2d 390 (Pa. 1976).

42. *Id.* at 391 (Roberts, J., concurring).

action would serve no function.[43]

Another instance of this form-oriented approach is found in a recent opinion strongly indicating that a motion to quash the indictment is the only method to preserve a claim of a speedy trial violation.[44] While a motion to quash is undoubtedly the proper form of action in this situation, it seems unwise to make semantic distinctions in denominating a procedural form as the exclusive protector of a constitutional right.[45] Yet the court's preoccupation with form, although perhaps undesirable, does not always result in detriment to the defendant. To illustrate: a failure to make a motion to suppress will waive any claim relating to the admission of unconstitutionally obtained evidence, but will not waive a claim based on the admission of evidence procured in violation of a nonconstitutional right.[46] This distinction was produced by the court's belief that it was mandated by the language of rule 323 of the Pennsylvania Rules of Criminal Procedure,[47] but the judicial task of extending the

43. *Id.*

44. Commonwealth v. Roundtree, 458 Pa. 351, 326 A.2d 285 (1974). In *Roundtree*, the supreme court affirmed the defendant's murder conviction, refusing to consider the defendant's claim that his right to a speedy trial had been violated. Even though the defendant was not tried until six years after his arrest, the court held the speedy trial issue had been waived because it had not been preserved at trial by a proper objection. The court noted that the proper procedure for objecting to the length of delay in being brought to trial is a motion to quash the indictment. *Id.* at 354, 326 A.2d at 287. The defendant subsequently filed a petition under the Post Conviction Hearing Act (PCHA), Pa. Stat. Ann. tit. 19, §§ 1180-1 to -14 (Supp. 1976), and alleged that his trial counsel had been ineffective in failing to properly preserve the speedy trial issue. This claim was denied by the PCHA court, but on appeal the supreme court reversed, holding that trial counsel had no reasonable basis for failing to preserve the issue. Commonwealth v. Roundtree, 364 A.2d 1359 (Pa. 1976). The court again stated that a motion to quash the indictment was the proper method of objecting to the length of delay in being brought to trial. *Id.* at 1362 n.3.

45. In a concurring opinion, Justice Roberts suggested that the defendant could also move to nolle pros the indictment, and argued that the deprivation of constitutional rights should not depend on counsel's choice of legal terminology. 458 Pa. at 356-57, 326 A.2d at 287-88.

46. *See* Commonwealth v. Pritchitt, 359 A.2d 786 (Pa. 1976) (failure to object at trial that incriminating statements were obtained as result of a violation of PA. R. CRIM. P. 130 waived the issue, but failure to make pre-trial motion to suppress would not, by itself, waive the issue).

47. The pertinent language of PA. R. CRIM. P. 323 provides: "The defendant or his attorney may make application to the court to suppress any evidence alleged to have been obtained in violation of the defendant's constitutional rights." The *Pritchitt* court, relying on Commonwealth v. Murphy, 459 Pa. 297, 328 A.2d 842 (1974), felt this language required that rule 323 be applied exclusively to evidence obtained in violation of constitutional rights. 359 A.2d at 787 n.4. In *Murphy*, Justice Roberts stated that while it was desirable to require all evidentiary objections not dependent on their trial context for decision to be raised by pre-

application of rule 323 to evidence obtained in violation of nonconstitutional rights does not seem as insurmountable as the court believed.[48] This is especially true since an expansive interpretation would allow the courts to deal more expeditiously with admissibility issues,[49] and would avoid the paradox of treating constitutional rights as more susceptible to waiver than nonconstitutional rights.

The kind of action the court is willing to require in order to preserve a claim was indicated in *Commonwealth v. Baker*.[50] In that case, the court denied a motion to suppress grounded on a claim that the defendant was too intoxicated to make a voluntary statement. At trial, the testimony of two of the arresting officers, who were not present at the suppression hearing, supported the defendant's claim of intoxication. The court determined that the defendant's failure to request at the suppression hearing the production of all policemen who were in a position to have observed him at the time the statement was made waived further consideration of the issue.[51] This seems an excessive burden to place on the defendant, especially since rule 323 does not suggest that such action is a necessary part of the procedure to bar the admission of unconstitutionally obtained evidence.[52]

Perhaps the most significant and justifiable requirement of adherence to form is that post-verdict motions must be in writing to comply with rule 1123(a).[53] This mandate was announced in

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trial motions, such a requirement would result in unfair surprise. He suggested that the legislature amend rule 323 so that its application would not be confined to unconstitutionally obtained evidence. 459 Pa. at 302-03, 328 A.2d at 845 (dissenting opinion).

48. The court could have easily adopted the reasoning of Justice Nix's dissenting opinion in *Murphy*. He felt that the trial judge had inherent power, incidental to his general authority to provide for an orderly disposition of the issues, to dispose of issues requiring extensive testimony out of the hearing of the jury. *Id.* at 301, 328 A.2d at 844.

49. *Id.* Justice Nix pointed out that the majority's holding would detract from the orderly disposition of trial matters by prolonging the trial and breaking the continuity of the presentation of evidence to the jury.

50. 353 A.2d 406 (Pa. 1976).

51. The court's finding that this claim was waived was actually based on the defendant's failure to properly preserve the issue at trial and in post-verdict motions. However, even if the issues had been preserved at these stages, the court clearly indicated that the defendant's initial failure to request the Commonwealth to produce all policemen who could testify to the defendant's state of sobriety would have waived the claim. *Id.* at 409 n.4.

52. *See* PA. R. CRIM. P. 323(d). This provision requires only that the application state specifically the evidence sought to be suppressed, the constitutional grounds for the motion, and the supporting facts.

53. PA. R. CRIM. P. 1123(a). Under the rule, the defendant must file post-verdict motions for a new trial and in arrest of judgment within seven days after a guilty verdict.

Commonwealth v. Blair,[54] which condemned the former practice of making boilerplate written motions and arguing specific oral motions as unduly complicating the appellate task of determining whether alleged errors had been properly preserved.[55] Undoubtedly, the form of the action, as in the case of post-verdict motions, is often vital in determining whether the trial court has had an opportunity to correct an error. But courts should endeavor to avoid a rigid approach which elevates form over substance and serves no functional purpose.[56] A dogmatic approach based on form will not enhance uniformity but, rather, will likely result in further inconsistencies as judges attempt to avoid the inequities spawned by its syllogistic rules.

2. Specificity in the Statement of the Grounds

The courts, in addition to demanding specificity in the form of the allegation, have been equally exacting in requiring that the grounds of the allegation be precisely stated.[57] Once a theory has been proposed as the basis for a claim, the claimant may not thereafter advance a new theory to support his claim. Moreover, the defendant must also preserve the specific argument in support of the ground

54. 460 Pa. 31, 33 n.1, 331 A.2d 213, 214 n.1 (1975).

55. An exception to this rule is that oral motions made prior to *Blair* will generally be considered on appeal since they were made in reliance on a procedure long accepted by the courts. Commonwealth v. Fortune, 346 A.2d 783 (Pa. 1975); *accord*, Commonwealth v. May, 353 A.2d 815 (Pa. 1976); Commonwealth v. Bomar, 364 A.2d 954 (Pa. Super. 1976). This exception to *Blair* does not apply where neither the record nor the trial court's opinion indicates that the issue was ever raised orally on post-verdict motions. Commonwealth v. Coley, 351 A.2d 617 (Pa. 1976).

56. *See* Commonwealth v. Brown, 234 Pa. Super. 119, 338 A.2d 659 (1975). In *Brown*, the bill of indictment charged the defendant with corrupting the morals of a minor by sexual intercourse, but the trial judge did not instruct the jury that the corrupting in this case had to be by the act of intercourse; instead, the judge quoted the general statutory language. After the charge, the defense counsel informed the judge that he felt the general charge on corruption could lead to a conviction even if the jury did not believe the defendant committed the specific corrupting acts alleged in the indictments. Defense counsel never took an exception to the charge and the court held this failure precluded appellate review of the erroneous jury charge. In a dissenting opinion, Judge Hoffman stated that *Clair* should not be "interpreted as meaning an issue is automatically waived if the magic words 'I object' are missing from the record." *Id.* at 125, 338 A.2d at 662.

57. It should be noted that if the grounds for the objection are obvious it is unnecessary to state the specific grounds. Commonwealth v. Maloney, 365 A.2d 1237, 1242 (Pa. 1976). What an appellate court may deem obvious, however, is uncertain.

for relief.[58] This requirement may be illustrated by examining *Commonwealth v. Mitchell,*[59] a case involving a challenge to the validity of a confession. At the suppression hearing and trial, the defendant alleged his confession was involuntary under the totality of the circumstances test,[60] but on appeal the confession was contested on the basis that it was the result of an unnecessary delay between arrest and arraignment.[61] The court refused to consider granting relief on the new theory,[62] even though the claim that the confession was involuntary remained the same.[63] Perhaps more importantly, the superior court has recently interpreted *Mitchell* as

58. *See* Commonwealth v. Gilmore, 347 A.2d 305, 307 (Pa. 1975) (theory not raised in support of motion to suppress could not be raised on appeal seeking reversal of the motion's denial).

59. 346 A.2d 48 (Pa. 1975). This decision overruled Commonwealth v. Wayman, 454 Pa. 79, 309 A.2d 784 (1973), to the extent that *Wayman* held it permissible to advance for the first time on appeal different supporting arguments or theories when the issue on appeal is the same as at trial. *Wayman* was considered viable precedent as recently as Commonwealth v. Doamaral, 461 Pa. 517, 337 A.2d 273 (1975). *See also* PA. R. CRIM. P. 323(d), which requires that the motion to suppress state the specific constitutional grounds rendering the evidence inadmissible, as well as the particular supporting facts and events.

60. This test precludes admission into evidence of confessions by the accused unless, considering the totality of the circumstances and all the relevant factors, the confession was the product of the defendant's free and unconstrained will. *See, e.g.,* Commonwealth v. Madilia, 439 Pa. 125, 266 A.2d 633 (1970); Commonwealth *ex rel.* Butler v. Rundle, 429 Pa. 141, 239 A.2d 426 (1968).

61. *See* PA. R. CRIM. P. 130. This provision requires that a defendant arrested without a warrant be given a preliminary arraignment without unnecessary delay. *See also* Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972) (all evidence obtained as a product of an unnecessary delay between arrest and arraignment is inadmissible).

62. Although the new theory of unnecessary delay had not been judicially enunciated at the time trial concluded, the court held that failure to raise it at trial waived the claim. 346 A.2d at 53. Applying the waiver rule in this manner caused the supreme court to reach an anomalous result in *Gilmore.* There the court held that failure to make a *Futch* argument at trial waived it on appeal, even though *Futch* was not decided until after the conclusion of the trial. However, whether counsel was ineffective in failing to preserve the issue had to be determined in consideration of whether the nonexistence of a legal theory is a reasonable basis for not asserting the theory. Commonwealth v. Gilmore, 347 A.2d 305, 307-08 (Pa. 1975). This same result has been reached in more recent cases. *See* Commonwealth v. Logan, 364 A.2d 266 (Pa. 1976) (waiver of claim that incriminating statements were the product of an unnecessary delay); Commonwealth v. Drummond, 238 Pa. Super. 311, 357 A.2d 600 (1976) (waiver of claim that search of auto was made without probable cause).

63. Such a result is questionable in this situation since the general requirement that an issue be raised at the earliest opportunity has been satisfied. The "earliest opportunity" rule permits claims of ineffective assistance of counsel and involuntary waiver of the right to file post-verdict motions to be initially raised on appeal, because this is the first opportunity to do so. *See* note 88 and accompanying text *infra.* In cases such as *Gilmore,* the defendant has no realistic opportunity to raise a theory until it is judicially announced.

applying to post-verdict motions, concluding that unless the specific theories supporting the grounds for reversal are articulated in written motions, they are waived for appellate review.[64] Consequently, even though the specific theories in support of a claim are stated earlier in the proceedings, failure to reiterate them in written post-verdict motions will preclude consideration of such theories on review.[65]

It is uncertain whether the specific theories in support of an assertion made during the stress of trial must be stated, but an affirmative answer was recently indicated when the supreme court stated that a sufficiently specific objection had not been made to the declaration of a mistrial where counsel claimed the mistrial was not manifestly necessary.[66] The court stated that the reason for claiming the mistrial was not manifestly necessary was not sufficiently explained to the trial court.[67] This degree of specificity presents a hazard to counsel; if the ground for the objection is specifically stated, all other reasons for its support are waived.[68] It seems the courts may be demanding too great a degree of specificity since "an appellate court abdicates its historic obligation to do justice if it applies waiver too hastily."[69]

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64. Commonwealth v. Polof, 362 A.2d 427, 430-31 (Pa. Super. 1976).

65. *See id.* In *Polof*, the defendant made pre-trial motions to quash and for discovery, and alleged several specific theories in support of the motions, which were briefed, argued, and denied. In written post-verdict motions, he only claimed that the denial of his pre-trial motions was erroneous, and he failed to repeat the specific theories in support of these motions. This failure waived appellate consideration of the specific theories. *Id.* at 430. Judge Hoffman commented that "little is gained by the formality of requiring specific theories to be reiterated in post-trial motions." *Id.* at 434 (dissenting opinion).

66. Commonwealth v. Bartolomucci, 362 A.2d 234 (Pa. 1976).

67. *Id.* at 239. The defense objected at trial because it felt that additional instructions should be given to the jury before a mistrial was declared. On appeal, the defense claimed that it was doubtful whether the mistrial was manifestly necessary because the trial judge had failed to communicate directly with the jury. The court did not view the trial objection as sufficient to enable the appellate theory to be asserted. The court did not, however, hold that a double jeopardy claim was waived because it believed *Clair* to be inapplicable to this type of claim. *See* notes 99-115, and accompanying text *infra*.

68. *See* Commonwealth v. Stoltzfus, 462 Pa. 43, 337 A.2d 873 (1975) (where counsel objected to the district attorney's cross-examination on basis that he was questioning the defendant about other offenses, he waived the claim that the defendant's fifth amendment right not to testify had been violated).

69. 362 A.2d at 433 (Hoffman, J., dissenting).

B. Timeliness

Timeliness does not present as many difficulties as specificity because it is more susceptible to objective regulation. The Pennsylvania Rules of Criminal Procedure generally define the stage of the proceeding when a particular action must first be taken. Nearly all allegations of error must be raised for the first time at one of three general stages of the trial: pre-trial, during trial, and post-verdict.[70] It is not always sufficient, however, merely to point out the error when initially required, since the error must be preserved at every stage of the proceeding if appellate review is to be obtained.[71]

Many issues must be raised prior to commencement of the trial or they will be deemed waived for consideration both at trial and on appeal.[72] The Pennsylvania Rules of Criminal Procedure stipulate that pre-trial applications for relief must be made at least ten days before trial, unless the opportunity did not exist, or the defendant was not aware of the grounds.[73] The rules also provide that for barring evidence obtained in violation of the defendant's constitutional rights an application to suppress must be made ten days before trial.[74] The motion to suppress must state the specific constitutional grounds rendering the evidence inadmissible, and state with particularity the supporting facts.[75] The court will not strictly apply the waiver rule where noncompliance with the rule is accompanied by other equitable considerations.[76] Another situation in

70. There are important exceptions to this general statement. *See* notes 94-98 & 116-17 and accompanying text *infra*.

71. *See* note 34 and accompanying text *supra*.

72. *See* Commonwealth v. May, 353 A.2d 815, 816 (Pa. 1976) (failure to raise the theory of unnecessary delay in suppression motion waived further consideration of the issue by the trial court or on appeal).

73. PA. R. CRIM. P. 304-05. The comment to rule 304 lists twelve examples of applications included in its definition of pre-trial application.

74. PA. R. CRIM. P. 323(a)-(b). For recent applications of this rule see Commonwealth v. Moore, 353 A.2d 808 (Pa. 1976) (failure to move for a suppression hearing pursuant to rule 323(b) waives a claim that a confession was the product of an illegal arrest); Commonwealth v. Melnyczenko, 238 Pa. Super. 203, 358 A.2d 98 (1976) (challenge to the admissibility of a statement grounded on alleged *Miranda* violation is waived in the absence of a motion to suppress made in accordance with rule 323).

75. PA. R. CRIM. P. 323(d). *See* Commonwealth v. Jackson, 346 A.2d 746 (Pa. 1975) (defendant's failure to raise the issue of unlawful arrest at the suppression hearing meant he could not raise it later to have the evidence suppressed).

76. Rule 323(b) provides that there will be no waiver even in the absence of a motion to suppress where the interests of justice require otherwise, or the opportunity did not previously exist. *See* Commonwealth v. Yates, 357 A.2d 133 (Pa. 1976) (indicating that if testimony were

which pre-trial action should be taken is when a claim of double jeopardy is asserted; an objection may be required prior to the second trial to preserve the claim for review.[77] Although a liberal reading of recent cases suggests that the double jeopardy issue may be initially raised at any stage of the proceeding,[78] a more probable interpretation is that the court's elimination of the objection requirement is restricted to the proceeding at which the mistrial is declared.[79]

Objections at trial should be made at the earliest opportunity that will allow the trial judge to rectify the error. The further the proceeding progresses after an unaddressed error has been committed, the less chance a party has for redress. Generally, any contention regarding the correctness of the trial court's ruling must be pointed out at the time of such ruling.[80] Where inadmissible testimony[81] or prejudicial evidence is sought to be admitted,[82] or prejudicial re-

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unavailable at the suppression hearing, failure to introduce it will not waive a claim based on that testimony); Commonwealth v. Heacock, 355 A.2d 828 (Pa. 1976) (objection at trial to cross-examination of defendant on possession of evidence procured by warrantless search by police was sufficient to preserve the claim that evidence should have been suppressed, where evidence was not considered at suppression hearing because Commonwealth stated it did not intend to question defendant on possession).

77. *See* Commonwealth v. Fredericks, 235 Pa. Super. 78, 340 A.2d 498 (1975) (failure to object at the first trial when the mistrial was declared did not waive the double jeopardy issue, but failure to object prior to the retrial waived the issue).

78. Justice Manderino's opinions in Commonwealth v. Bartolomucci, 362 A.2d 234, 240 (Pa. 1976) (concurring opinion), and Commonwealth v. Walker, 362 A.2d 227, 233 (Pa. 1976) (concurring opinion), present the view that the issue of double jeopardy is similar to an issue of subject matter jurisdiction—capable of being initially raised at any time.

79. *See* Commonwealth v. Coleman, 235 Pa. Super. 379, 341 A.2d 528 (1975). A reading of this case may give the impression that an objection at the time the mistrial is declared is necessary to preserve the double jeopardy issue. But *Bartolomucci* has definitely eliminated any possibility that this is required.

80. *See, e.g.*, Commonwealth v. Bartolomucci, 362 A.2d 234 (Pa. 1976) (*Clair* requires specific objection to the trial judge's rulings and conduct to permit a challenge thereto on appeal); Commonwealth v. Davenport, 342 A.2d 67 (Pa. 1975) (where trial judge erroneously refused to consider certain evidence because he misinterpreted the remanding opinion, the defendant waived this issue by failing to object at the time of the ruling).

81. *See* Commonwealth v. Foster, 360 A.2d 723 (Pa. Super. 1976) (failure to object when testimony is given precludes claim on appeal that such testimony was hearsay).

82. *See, e.g.*, Commonwealth v. Williams, 458 Pa. 319, 326 A.2d 300 (1974) (failure to object to display of baseball bat during trial waived claim that such display was prejudicial even though the claim was included in post-verdict motions); Commonwealth v. Marker, 231 Pa. Super. 471, 331 A.2d 883 (1975) (defendant's failure to promptly object to a question precluded appellate consideration of claim contesting the admission of the answer into evidence).

marks are made,[83] the defendant must object immediately after such action occurs. Similarly, an objection to the jury charge should be made at the conclusion of the charge, but before the jury retires.[84] The timeliness requirement, as it relates to objections made during trial, should not present any real difficulty to trial counsel since it is governed by long existing evidentiary rules.[85]

To have an issue considered on appeal, it must nearly always be included in post-verdict motions in conformance with rule 1123(a).[86] Even though a timely and specific allegation of error is made earlier in the proceeding, it is waived for the purposes of appeal unless it is also included in post-verdict motions.[87] The reason for requiring that issues be raised by post-verdict motions is that the procedure will often dispense with the necessity for an appeal and, if not, will offer the appellate court the benefit of the parties' arguments and the lower court's opinion on the issues raised.[88] This in turn will "promote judicial economy and the orderly administration of the appellate process."[89] However, if there is a complete failure to file

83. *See, e.g.*, Commonwealth v. Johnson, 354 A.2d 886 (Pa. 1976) (counsel must object to prejudicial remarks in the prosecution's close during or after the close); Commonwealth v. Hilton, 461 Pa. 93, 334 A.2d 648 (1975) (objection to prejudicial remarks must be raised immediately after they are made); Commonwealth v. Smith, 238 Pa. Super. 422, 357 A.2d 583 (1976) (failure to object when witness made reference to defendant previously having been in jail waived the issue on appeal, even though objection was included in post-verdict motions).

84. PA. R. CRIM. P. 1119(b). *See also* Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974). *Cf.* Commonwealth v. Martin, 348 A.2d 391 (Pa. 1975) (objecting to content of the jury charge by interrupting the judge during its delivery is improper procedure but sufficient to preserve the alleged error).

85. For other cases illustrative of waiver of an issue on appeal because of the absence of a timely objection at trial see Commonwealth v. Boone, 354 A.2d 898 (Pa. 1976) (waiver of claim that verdict was not a result of free and impartial deliberation); Commonwealth v. Powell, 459 Pa. 253, 328 A.2d 507 (1974) (violation of sixth amendment right not considered in the absence of timely application to the trial court for compulsory process); Commonwealth v. Conyers, 238 Pa. Super. 386, 357 A.2d 569 (1976) (waiver of spouse's marital privilege not to testify).

86. *See* notes 53-55 and accompanying text *supra*.

87. *See, e.g.*, Commonwealth v. Kearney, 459 Pa. 603, 331 A.2d 156 (1975) (objection to error made at trial would not be considered on appeal when not raised in post-verdict motions); Commonwealth v. Mitchell, 461 Pa. 555, 337 A.2d 292 (1975); Commonwealth v. Lowe, 460 Pa. 357, 333 A.2d 765 (1975); Commonwealth v. Hustler, 364 A.2d 940 (Pa. Super. 1976); Commonwealth v. Keysock, 236 Pa. Super. 474, 345 A.2d 767 (1975) (to preserve an issue for appeal the litigant must make a timely and specific objection and raise the issue in post-verdict motions).

88. Commonwealth v. Carter, 463 Pa. 310, 313, 344 A.2d 846, 848 (1975).

89. *Id.*

post-verdict motions, it may be claimed on appeal that they were not knowingly and intelligently waived.[90] This is not a departure from the principle that an issue must be raised at the earliest opportunity, since appeal is usually the first chance the defendant has to contest the voluntariness of his failure to file post-verdict motions.[91] This same reasoning obviates the necessity of including allegations of error relating to the sentencing procedure in post-verdict motions,[92] although a contemporaneous objection is required to preserve an error occurring during the sentencing procedure for appellate review.[93]

C. *Exceptions to Timeliness and Specificity*

True exceptions to the waiver doctrine are those issues which may be raised by either party or the court at any stage of the proceeding, regardless of prior opportunities to raise them. Examples of such nonwaivable claims are those contesting subject matter jurisdiction,[94] the per se illegality of sentences,[95] and the competency of a

90. PA. R. CRIM. P. 1123(b)-(c). Under these provisions, the defendant must be informed of his right to file post-verdict motions; the rules set forth the manner in which the trial judge shall convey the information. *See also* Commonwealth v. Swain, 237 Pa. Super. 322, 354 A.2d 256 (1975); Commonwealth v. Wardell, 232 Pa. Super. 468, 334 A.2d 746 (1975). If the appellate court cannot determine from the record whether the failure to file post-verdict motions was voluntary, it will remand for an evidentiary hearing to determine the voluntariness issue. If it is determined that the failure to file post-verdict motions was involuntary, the appellate court will remand to allow post-verdict motions to be filed nunc pro tunc. *See* Commonwealth v. Steffish, 365 A.2d 865 (Pa. Super. 1976).

91. The defendant may raise the voluntariness issue by filing a petition with the lower court for leave to file post-verdict motions nunc pro tunc, or request the appellate court to remand for an evidentiary hearing to determine whether there was a voluntary and intelligent waiver of the right to file post-verdict motions. Failure to take such action may result in waiver. *See* Commonwealth v. Bliss, 239 Pa. Super. 347, 358-59, 362 A.2d 365, 371 (1976).

92. Post-verdict motions must be decided before sentencing since appeal lies from the final order of the trial court, which is sentencing. *See* PA. R. CRIM. P. 1123, 1405.

93. *See* Commonwealth v. Boone, 354 A.2d 898 (Pa. 1976) (failure to object at sentencing proceeding that the imposition of a minimum as well as a maximum sentence deprived defendant of due process waived the claim for appellate consideration); Commonwealth v. Piper, 458 Pa. 307, 328 A.2d 845 (1974) (claim that sentencing denied defendant equal protection of the law was waived because it was not raised at sentencing proceeding or in the superior court).

94. *See* Commonwealth v. Little, 455 Pa. 163, 314 A.2d 270 (1974) (lack of subject matter jurisdiction can never be waived, and can be raised at any stage of the proceeding by counsel or by the court sua sponte); Commonwealth v. Diaz, 235 Pa. Super. 352, 340 A.2d 559 (1975).

95. *See* Commonwealth v. Lane, 236 Pa. Super. 462, 345 A.2d 233 (1975) (sentence which exceeds the statutory maximum may be initially challenged at any time). *Cf.* Commonwealth

defendant to stand trial.[96] The validity of a guilty plea, insofar as the claim only challenges the on-the-record adequacy of the colloquy, is also probably allowed to be raised for the first time on appeal.[97] But it is uncertain whether a petition to withdraw the guilty plea must be made to the trial court to preserve the issue when the alleged error cannot be clearly determined from the record.[98]

Another claim which may conceivably occupy a nonwaivable status is double jeopardy. In *Commonwealth v. Bartolomucci*,[99] the court held that a failure to object to a mistrial did not preclude an allegation of double jeopardy at a retrial[100] grounded on a claim that

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v. Walker, 234 Pa. Super. 433, 340 A.2d 858 (1975) (allegation of error concerning the validity of a sentence which is not unlawful per se is waived if not raised at the sentencing hearing).

96. *See* Commonwealth v. Silo, 364 A.2d 893 (Pa. 1976). In *Silo*, the court held that counsel could not voluntarily refrain from raising on appeal the defendant's competency to stand trial, even though the defendant had requested counsel not to raise the issue. The court stated, "[t]he question of competency is an issue that cannot be effectively waived." *Id.* at 894. The appellate court ordered counsel to file a supplemental brief setting forth all arguments in support of the contention that the defendant was incompetent to stand trial. *Id.* at 895.

97. In Commonwealth v. Minor, 356 A.2d 346 (Pa. 1976), and Commonwealth v. Rodgers, 465 Pa. 379, 350 A.2d 815 (1976), the fact that the defendants appealed directly from judgment of sentence without first petitioning the trial court to withdraw the guilty plea, or taking any other action to afford the trial court an opportunity to address the issue, did not preclude the defendants from claiming on appeal that the plea was invalid because of an inadequate colloquy.

98. *See* Commonwealth v. Lee, 460 Pa. 324, 327 n.1, 333 A.2d 749, 750 n.1 (1975). The court ruled that where the only challenge to the trial proceedings is directed to the validity of the guilty plea, the proper procedure is to first file with the trial court a petition to withdraw the plea. Although the *Lee* appeal was not preceded by such a petition, nor by raising the inadequate colloquy claim in post-verdict motions, the court considered the merits of the appellant's claim. This was done because of the uncertainty existing at that time of the proper method of attacking a guilty plea, and the absence of a definitive procedural rule; moreover, the alleged error could be determined from the record. *But cf.* Commonwealth v. Minor, 356 A.2d 346, 351 (Pa. 1976) (Pomeroy, J., dissenting); Commonwealth v. Rodgers, 350 A.2d 815, 818 (Pa. 1976) (Pomeroy, J., concurring). Justice Pomeroy took the position that the court properly considered the validity of guilty pleas when they were raised for the first time on appeal only because the challenge was directed solely to the sufficiency of the colloquy, which could be determined entirely from the record. If the claim could not be determined from the record, he felt that the defendant should be required to file a petition with the trial court to withdraw the guilty plea. Justice Pomeroy reasoned that a petition to withdraw a guilty plea served the same function as a post-verdict motion; it affords the trial court an opportunity to correct its own error, which promotes judicial economy.

99. 362 A.2d 234 (Pa. 1976).

100. The defendant did object to the declaration of the mistrial, but he did not specify his appellate theory in support of the objection until his subsequent reprosecution. At the first trial, in response to the court's inquiry into the defense's position regarding a discharge of the jury, counsel requested only that additional instructions relating to the responsibilities of the jurors to themselves and each other be given. The court refused, and granted a mistrial.

the mistrial had been erroneously declared.[101] The basis of the court's holding was that a functional conflict existed between *Clair*'s waiver rule and the substantive law of double jeopardy.[102] The court took the view that double jeopardy law required an affirmative acquiesence by the defendant to a mistrial not manifestly necessary,[103] and that silence was never the constitutional equivalent of such an acquiesence.[104] To apply the waiver rule where the defendant fails to object to the declaration of an unnecessary mistrial would be the functional equivalent of holding that silence constitutes an affirmative acquiesence by the defendant,[105] which the court felt was constitutionally impermissible.[106] Although the result of *Bartolomucci* is justifiable,[107] its rationale casts a spectre of doubt on the current

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Id. at 236. At the retrial, the defendant contended that the trial judge's failure to directly communicate with the jury before discharging them made it uncertain whether declaration of the mistrial had been manifestly necessary. The court acknowledged that any doubt regarding the manifest necessity of granting a mistrial must be resolved in favor of the accused. *Id.* at 239.

101. Although the Commonwealth contended that the absence of a correct specific objection to the mistrial waived the manifest necessity issue, the court stated that even a complete failure to object would not waive the issue. *Id.* at 239.

102. The court did concede that conceptually no conflict existed since the defendant's silence resulted in waiver and the manifest necessity issue was never reached. It opted, however, for a functional analysis rather than a conceptual approach. *Id.* at 238.

103. It is well established that, under the double jeopardy clause, to re-try a defendant after a mistrial has been declared without the defendant's request or consent, there must have been a manifest necessity for the mistrial. U.S. v. Perez, 22 U.S. (9 Wheat.) 165 (1824); *See, e.g.*, U.S. v. Dinitz, 424 U.S. 600 (1976).

104. According to the court, the lack of an objection "should not be viewed as consent or a request, nor should it be considered as the functional equivalent of these, that is, a waiver." 362 A.2d at 239.

105. The court reasoned that to hold the failure to properly object at the mistrial precluded the defendant from later raising the manifest necessity issue, would have the same effect, and be the functional equivalent, of holding the defendant had consented to, or requested, the mistrial.

106. The supreme court determined that *Clair*'s functional inconsistency with what the court characterized as the constitutional mandate that the defendant must consent to or request a mistrial not manifestly necessary made it inapplicable. *Id.* at 238.

107. By treating the issue in the context of specificity, the court could have reached the same result, while remaining consistent with *Clair*. It could have held that the defendant's objection was sufficiently specific to alert the trial judge to take further action to determine if the mistrial was manifestly necessary. *See* notes 66 & 67 and accompanying text *supra*. However, this approach would not have permitted the court to unequivocally eliminate the requirement of an objection at the time a mistrial is declared, which it obviously wished to do.

Perhaps a more persuasive approach would have been to hold that timeliness requirements did not require the defendant to take any action until the state attempted to re-try him. This is logical, since there is no infringement of the defendant's right not to be placed twice in

viability of the waiver rule.[108] The court's reasoning that procedural waiver of an issue is the functional equivalent of a substantive waiver[109] is equally applicable to all other constitutional claims.[110] To apply this rationale consistently would completely vitiate the efficacy of the waiver rule by removing constitutional claims from its governance.[111] However, because the Pennsylvania courts have held prior[112] and subsequent[113] to *Bartolomucci* that *Clair* is applica-

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jeopardy until the state reprosecutes. A similar approach was adopted by the superior court in Commonwealth v. Fredericks, 235 Pa. Super. 78, 340 A.2d 498 (1975). The *Fredericks* court concluded that since the defendant could not demand that his trial proceed to verdict, it would be inconsistent to require him to object to the declaration of a mistrial. *But cf.* U.S. v. Jorn, 400 U.S. 470, 485-86 (1971) (defendant has an interest in the decision to take the case from the jury since it may well be important to him to conclude once and for all his "confrontation with society"). *See also* Estelle v. Williams, 425 U.S. 501 (1976) (there is no conflict between state waiver rules and the Federal Constitution).

108. *See* 362 A.2d at 242 (Pomeroy, J., dissenting). Justice Pomeroy stated that the same tension that made *Clair* inapplicable to a double jeopardy claim according to the majority, has existed in all claims of constitutional error which the court has so far refused to review on the authority of *Clair*. *See also id.* at 240 (Nix, J., dissenting). Justice Nix believed the majority implicitly had suggested that all constitutional claims were an exception to *Clair*'s waiver doctrine. In his view, there was no reason to depart from a strict application of the waiver rule when constitutional claims are involved. *Id.* at 241.

109. A voluntary relinquishment of a constitutional right is in effect a substantive waiver, which must be distinguished from a *Clair* procedural waiver. Substantive waiver results only from knowing and intentional action by the defendant, while procedural waiver is caused by the defendant's inaction, or inadvertent action. For an example of a conceptual approach to this problem see 362 A.2d at 242 (Pomeroy, J., dissenting). Justice Pomeroy could discern no conflict between *Clair* and the substantive law of double jeopardy. He felt that substantive law was only relevant in considering claims that had been properly preserved by compliance with procedural rules. *Id.* at 243.

110. Generally, a defendant is entitled to all of his substantive constitutional rights unless he knowingly and intentionally relinquishes them. Commonwealth v. Norman, 447 Pa. 217, 285 A.2d 523 (1971). Silence is never the equivalent of such a voluntary relinquishment, *i.e.*, a substantive waiver. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969); Commonwealth v. Williams, 454 Pa. 368, 372, 312 A.2d 597, 599 (1973). Thus, if procedural waiver is the equivalent of substantive waiver, the necessary conclusion drawn from *Bartolomucci* is that *Clair* is inapplicable to all constitutional claims.

111. If the functional analysis is consistently applied, no constitutional claim may be waived, and the judicial economy objective of *Clair* would be frustrated. If it is applied only to double jeopardy violations, and remains a viable analysis, a defendant may never ground an ineffectiveness claim on unpreserved error; it would be theoretically inconsistent to permit the defendant to predicate an ineffectiveness claim on counsel's failure to allege error, while simultaneously construing such silence as a voluntary consent to waiver by the defendant. This would completely defeat *Clair*'s stated purpose of allowing a defendant to cure any prejudice caused him by unpreserved errors through ineffective assistance of counsel claims. It is not the intention of this writer to suggest that the courts will allow either of these results to occur, but only to illustrate the incompatibility of a functional analysis and *Clair*.

112. For cases in which the Pennsylvania courts have previously held constitutional claims waived because not properly preserved see note 30 *supra*. *See also* Commonwealth v.

ble to constitutional claims, and since the United States Supreme Court has held that no conflict exists between state waiver rules and the Federal Constitution,[114] *Bartolomucci* is probably restricted to double jeopardy claims.[115] Paradoxically, claims of ineffective assistance of counsel, which *Clair* suggested as a supplemental safeguard to its waiver rule,[116] present the greatest threat to the effectiveness of the waiver rule.

IV. Ineffective Assistance of Counsel

It is well established that a claim of ineffective assistance of counsel is a necessary exception to the waiver rule.[117] Generally, the claim need not be raised at the stage of the proceeding during which the ineffectiveness occurs. More specifically, a claim of ineffective trial counsel may be raised for the first time on appeal, and a claim of ineffective appellate counsel may be first raised in a Post Conviction Hearing Act (PCHA)[118] proceeding. There are also several situations when a claim of ineffective assistance of trial counsel may be raised for the first time in a PCHA proceeding.[119]

Although there are many different kinds of ineffective assistance of counsel claims,[120] this comment is solely concerned with claims

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Bartolomucci, 362 A.2d at 242 n.2 (Pomeroy, J., dissenting); *id.* at 240-41 (Nix, J., dissenting).

113. *See, e.g.*, Commonwealth v. Logan, 364 A.2d 266 (Pa. 1976) (waiver of right to claim incriminating statements were involuntary); Commonwealth v. Jackson, 362 A.2d 324 (Pa. Super. 1976) (waiver of claims relating to involuntary statements).

114. Estelle v. Williams, 425 U.S. 501 (1976). *See* note 30 *supra.*

115. It is still not certain whether it is necessary to raise the manifest necessity issue at the retrial to preserve the claim for appeal, since the majority opinion did not specifically address this issue. However, the court did not overrule prior cases expressly requiring the issue to be raised at retrial. *See* Commonwealth v. Bryant, 461 Pa. 309, 336 A.2d 300 (1975) (failure to raise the double jeopardy issue in post-verdict motions after retrial waived the claim); Commonwealth v. Fredericks, 235 Pa. Super. 78, 340 A.2d 498 (1975) (failure to make objection at retrial to double jeopardy violation waived the issue). *See also* note 107 *supra.*

116. *See* note 24 and accompanying text *supra.*

117. Commonwealth v. Carter, 463 Pa. 310, 314, 344 A.2d 846, 848 (1975).

118. Pa. Stat. Ann. tit. 19, §§ 1180-1 to -14 (Supp. 1976). The Act encompasses the writ of habeas corpus and provides a uniform procedure for post-conviction proceedings. For a thorough explanation and analysis of the Act see Doty & Bluestine, *The Purpose and Application of the Pennsylvania Post-Conviction Hearing Act*, 45 Pa. B.A.Q. 480 (1974).

119. *See* notes 132 & 133 and accompanying text *infra.*

120. For a comprehensive study of the various kinds of ineffective assistance of counsel claims see Finer, *Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077 (1973) [hereinafter cited as Finer].

grounded on counsel's failure to properly preserve an issue for review. The significance of this type of ineffectiveness claim is that it allows the defendant to gain review of a claim that has not been properly preserved earlier in the proceeding. If counsel waives direct review of an issue by failing to make a specific and timely allegation of error earlier in the proceeding,[121] the defendant may then base a claim of ineffective assistance on counsel's failure at the next stage of review. Even though direct review of the unpreserved issue is precluded by *Clair*, the court will have to consider that issue within the context of the ineffectiveness claim.[122] The fact that a corresponding claim of ineffectivness always arises whenever an issue is waived under *Clair* seriously threatens the continued vitality of the waiver rule. In order to adequately illustrate the complete effect of the ineffectiveness exception on *Clair*'s rule, it is necessary to first discuss the mechanics of judicial review of ineffectiveness claims.

A. Procedure for Raising an Ineffectiveness Claim

Any claim of ineffective assistance of counsel necessarily includes an allegation that counsel's conduct had no reasonable basis designed to promote the defendant's interests.[123] The rationale for allowing a claim of ineffective assistance of trial counsel to be raised initially on appeal is that it would be unrealistic to expect the trial counsel to argue his own ineffectiveness, and unreasonable to require the defendant to recognize and point out the ineptitude of his counsel.[124] In the few cases in which this rationale is inapplicable, however, an ineffective trial counsel claim may be waived if not raised before conclusion of the trial proceeding.[125] Although a change

121. *See* notes 34-93 and accompanying text *supra* for a detailed examination of the requisites necessary to preserve an issue for direct review.

122. *See* notes 162 & 163 and accompanying text *infra*.

123. The test for determining ineffective assistance of counsel was set forth in Commonwealth *ex rel.* Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). *See* note 180 and accompanying text *infra*.

124. Commonwealth v. Carter, 463 Pa. 310, 314, 344 A.2d 846, 848 (1975) (explaining the reason why ineffective assistance claims are an exception to the rule that issues not raised in post-verdict motions are waived for review). *See* Bazelon, *supra* note 17, at 667-68. The author discusses why different counsel should argue trial counsel's ineffectiveness.

125. *See* Commonwealth v. Smallwood, 350 A.2d 822, 824 (Pa. 1976). Appellate counsel entered the proceedings after commencement of the trial, but before its conclusion. Since he had entered the trial at a stage providing him time to brief and argue in post-verdict motions that the previous trial counsel's failure to request that the jury be sequestered constituted

in counsel during trial proceedings is a relatively rare occurrence, the same approach is taken during the post-trial stages of the proceeding where the defendant is more likely to be represented by different counsel.[126]

Prior to *Clair*, it was not necessary to allege ineffective assistance of counsel to gain review of an unpreserved claim; review could be directly obtained by an allegation of fundamental error.[127] Thus, claims of ineffectiveness were usually raised at a PCHA proceeding, since in the absence of irrefutable proof on the record that counsel was not effective, an ineffective assistance claim would not be considered on appeal.[128] This was so because an evidentiary hearing was usually required to determine whether counsel's conduct had a reasonable basis designed to promote his client's interests.[129] Although the PCHA has always provided that a knowing failure to raise a cognizable issue on appeal waives PCHA relief in the absence of extraordinary circumstances,[130] the provision was rarely applied to ineffective assistance of counsel claims.[131] This practice was ab-

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ineffective assistance of counsel, counsel was not permitted to do so on appeal. *See also* Commonwealth v. Thorne, 234 Pa. Super. 93, 338 A.2d 593 (1975). Counsel from the defender's association failed to make a motion to suppress evidence, and was thereafter replaced by other counsel from the same association; the failure of the new counsel to claim that prior counsel's failure to make a motion to suppress constituted ineffective assistance of counsel waived that claim for appellate review.

126. *See* notes 132 & 133 and accompanying text *infra*.

127. *See* notes 7-18 and accompanying text *supra*.

128. *See, e.g.*, Commonwealth v. Benjamin, 219 Pa. Super. 344, 280 A.2d 625 (1971) (in the absence of clear and irrefutable on-the-record proof that counsel was ineffective, an ineffectiveness claim will not be decided on direct appeal); Commonwealth v. Cook, 230 Pa. Super. 283, 326 A.2d 461 (1974).

129. *See* Commonwealth v. Beatty, 236 Pa. Super. 137, 344 A.2d 591 (1975) (Spaeth, J., concurring and dissenting). Prior to Commonwealth v. Dancer, 460 Pa. 95, 331 A.2d 435 (1975), the superior court frequently admonished counsel for raising an ineffectiveness claim on direct appeal when an evidentiary hearing was necessary to determine the claim. 236 Pa. Super. at 140, 344 A.2d at 593.

130. PA. STAT. ANN. tit. 19, §§ 1180-4(b)(1)-(2), (c) (Supp. 1976). These sections generally provide that a knowing and understanding failure to raise an issue which could have been raised at any prior stage of the proceeding waives the issue. The waiver provision does not apply if the petitioner proves extraordinary circumstances justifying his failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or raise an issue is a knowing and understanding failure.

131. Apparently, the necessity of an evidentiary hearing to determine the ineffectiveness issue was viewed by the courts as an extraordinary circumstance justifying the bypass of appeal in favor of a PCHA proceeding. This caused Justice Pomeroy to predict in *Clair* that any alleviation of the appellate case load resulting from the decision would be accompanied by a corresponding increase in the burden on the PCHA courts. 458 Pa. at 424, 326 A.2d at 275 (dissenting opinion).

ruptly altered by *Commonwealth v. Dancer*'s[132] holding that claims of ineffective assistance of trial counsel must be raised on appeal unless: 1) petitioner is represented on appeal by his trial counsel; 2) petitioner is represented on appeal by counsel other than trial counsel, but the grounds upon which the ineffectiveness claims are based do not appear in the trial record; 3) petitioner proves the existence of other "extraordinary circumstances" justifying his failure to raise the issue; and 4) petitioner rebuts the presumption of "knowing and understanding failure."[133] When one of these four situations exists, the defendant may initially raise an ineffective trial counsel claim at a PCHA proceeding; otherwise, he is precluded from collateral relief on the issue. Of course, if failure to raise an ineffective trial counsel claim on appeal results in waiver, the defendant may allege appellate counsel was ineffective for failing to make that claim.[134] But success in obtaining relief seems more remote when an allegation of ineffective appellate counsel is predicated on appellate counsel's failure to raise an ineffective trial counsel issue.[135] The primary reason for allowing the claim to be first raised at a PCHA hearing in the enumerated circumstances is to provide the defendant with objective guidance on the ineffectiveness issue.[136]

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132. 460 Pa. 95, 331 A.2d 435 (1975).

133. *Id.* at 100-01, 331 A.2d at 438.

134. *Id.* at 101 n.4, 331 A.2d at 438 n.4. *See, e.g.*, Commonwealth v. Jackson, 362 A.2d 324, 336 (Pa. 1976) (Hoffman, J., concurring) (ineffectiveness of PCHA counsel could be alleged in a second PCHA hearing, based on the first PCHA counsel's failure to claim that direct appeal counsel was ineffective in failing to allege instances of trial counsel's ineffectiveness).

135. The defendant will have to show that trial counsel had no reasonable basis for failing to preserve an issue, and demonstrate that appellate counsel had no reasonable basis for failing to make the ineffective trial counsel claim.

136. The first exception permitting the defendant to initially raise an ineffectiveness claim in a PCHA proceeding merely acknowledges the unreality of requiring counsel to argue his own ineffectiveness. This is the same rationale underlying the recognition of the ineffectiveness claim itself as an exception; it is just as unlikely that counsel will objectively argue his ineffectiveness on appeal as at trial. *See* note 124 *supra*. The reasons for the second exception are that it would be impractical to require counsel to ferret out off-the-record instances of his predecessor's incompetence, or to expect the appellate court to decide a claim not appearing on the record.

The third and fourth situations parrot statutory provisions. *See* PA. STAT. ANN. tit. 19, §§ 1180-4(b)(2), (c) (Supp. 1976). The third exception is merely a broader statement of the first. *See* Commonwealth v. Holmes, 364 A.2d 259 (Pa. 1976) (ineffective assistance of counsel is an extraordinary circumstance precluding a waiver of PCHA relief because of a failure to raise a cognizable issue on appeal); Commonwealth v. Musser, 463 Pa. 85, 343 A.2d 354 (1975) (an

In situations where *Dancer* mandates that the ineffectiveness claim be raised on appeal, the fact that the record is inadequate to allow the appellate court to determine the claim does not remove the requirement that it be made on appeal. In *Commonwealth v. Twiggs,*[137] the court stated that when the record is inadequate it would vacate the judgment of sentence and remand for an evidentiary hearing to determine counsel's effectiveness.[138] If counsel is found to have been ineffective, a new trial will be awarded; if not, judgment will be reinstated.[139] Of course, if the ineffectiveness is found to have occurred at a post-trial stage of the proceeding, a new trial would not be necessary.[140] Regardless of the outcome, both parties have the right to appeal the result of the evidentiary hearing.[141] The primary effect of *Dancer* and *Twiggs* is that they require claims previously reviewed collaterally at a PCHA proceeding to be raised on direct appeal.

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issue may not be waived in a proceeding where the defendant is denied effective assistance of counsel).

The fourth exception usually occurs where the defendant has been denied his full appellate rights. *See, e.g.*, Commonwealth v. Holmes, 364 A.2d 259, 263 n.7 (Pa. 1976) (a *Douglas* denial precludes a finding of waiver under § 4 of the PCHA); Commonwealth v. Fiero, 462 Pa. 409, 341 A.2d 448 (1975) (even though the petitioner failed to allege in the PCHA petition that his failure to take an appeal was the result of a denial of his right to direct appeal, the court would not presume waiver where the petitioner did not have the assistance of counsel in composing the petition).

137. 460 Pa. 105, 331 A.2d 440 (1975).

138. *Id.* at 107 n.2, 331 A.2d at 441 n.2. The Commonwealth contended that the appellant could not raise an ineffectiveness issue on direct appeal which was not determinable from the record. The court ruled that not only could the appellant raise the claim on appeal, but that failure to do so would waive PCHA relief since his appellate counsel was different from trial counsel. The court then remanded for an evidentiary hearing to consider the claim because the record was inadequate to permit the court to make a determination. *See also* Commonwealth v. Beatty, 236 Pa. Super. 137, 344 A.2d 591 (1975). The appellant had discontinued an appeal in favor of filing a PCHA petition with the trial court. This was done because the appellant believed that an evidentiary hearing was necessary to adjudicate his ineffectiveness claim. The court held that the issue was waived for PCHA relief because of the discontinuance of the appeal. *But cf.* Commonwealth v. Haynes, 234 Pa. Super. 556, 340 A.2d 462 (1975) (no waiver where there was no assistance of counsel when the appeal was discontinued and PCHA relief sought).

For a recent application of the *Twiggs* procedure see Commonwealth v. Moore, 353 A.2d 808 (Pa. 1976) (remanded to determine if counsel's failure to make a motion to suppress constituted ineffectiveness since the factual allegations on which the claim was based were not apparent from the record).

139. 460 Pa. at 111, 331 A.2d at 443.

140. For example, if counsel were ineffective for failing to include an issue in post-verdict motions, the proper remedy would be to allow the defendant to file post-verdict motions nunc pro tunc. *See* Commonwealth v. Carter, 463 Pa. 310, 344 A.2d 846 (1975).

141. 460 Pa. at 111, 331 A.2d at 443.

B. Interpretive Problems with Dancer

For *Dancer*'s principles to be consistently applied, clarification is necessary in certain areas. An important question is exactly what constitutes new counsel for the purpose of requiring a claim of ineffective assistance of trial counsel to be raised on appeal. It is unclear whether *Dancer* merely refers to situations in which a different individual represents the defendant on appeal, or if "change in counsel" has a narrower meaning. In *Commonwealth v. Thorne*,[142] the superior court held that a claim of ineffective suppression hearing counsel was waived when the issue was not raised at trial where a different attorney represented the defendant.[143] The dissenting opinion[144] pointed out that because both attorneys belonged to the same defenders association there was no change of counsel within the meaning of *Dancer*; in the dissent's view, when a defendant is represented throughout trial and appeal by the same institutional attorney, a change in the individual attorneys is irrelevant to the purposes of *Dancer*.[145] Strong support for this position is found in *Commonwealth v. Via*,[146] an opinion antedating both *Dancer* and *Clair*. In that case, the supreme court held that an attorney's failure to point out his predecessor's ineffectiveness did not waive the claim when both were members of the same law office. The court stated that "the law will not assume that counsel has advised his client of his inadequacies or those of his associates."[147] The viability of this decision after *Clair* and *Dancer* is not certain,[148] but the rationale of *Via* and the *Thorne* dissent seem consistent with *Dancer*'s objective to provide guidance on the ineffectiveness issue. It is arguable that this approach would result in fewer waivers and have an adverse effect on judicial economy. Yet, even when waiver occurs, a corresponding claim[149] of ineffectiveness of appellate counsel arises.[150]

142. 234 Pa. Super. 93, 338 A.2d 593 (1975).

143. *Id.* at 97, 338 A.2d at 595.

144. *Id.* at 98, 338 A.2d at 596 (Hoffman, J., dissenting).

145. *Id.* at 100 n.3, 338 A.2d at 597 n.3.

146. 455 Pa. 373, 316 A.2d 895 (1974).

147. *Id.* at 377, 316 A.2d at 898.

148. For example, it could be argued that *Via*'s rationale is inapplicable to a large law firm or defenders association because the relationships between members are less personal; therefore, one member should be able to objectively argue that his co-member was ineffective.

149. *See* notes 171-73 and accompanying text *infra*.

150. It is imperative that the courts address this issue. A growing number of cases are

It is also unclear whether appellate counsel who served as trial counsel may raise a claim of ineffectiveness of trial counsel. *Dancer* makes certain that such a claim must be raised on appeal where appellate counsel is not the same as trial counsel,[151] but there is no converse statement articulated that counsel is precluded from claiming his own trial ineffectiveness on appeal. A negative implication to this effect can be drawn from the language of some cases,[152] and the reasoning of *Dancer* supports such a preclusion. If the ineffectiveness claim is raised on appeal, it will be deemed finally litigated and there will be no opportunity for further consideration of the claim in a PCHA proceeding.[153] If appellate counsel is the same as trial counsel, it is unlikely that the defendant will have received the objective guidance from counsel that the *Dancer* holding implicitly requires.

Another difficult issue confronted the superior court in *Commonwealth v. Boyer*,[154] when it held that the defendant's failure to take an appeal prevented PCHA review of his ineffective trial counsel claim.[155] The *Boyer* result seems inconsistent with the supreme court's decision in *Commonwealth v. Strachan*[156] that failure to raise an ineffectiveness claim on an uncounselled appeal did not waive PCHA relief, because the defendant was not provided with objective guidance from counsel on the ineffectiveness issue.[157] The

being handled by public defenders associations, which often divide trial and appellate work between different individuals within the association.

151. *See* note 133 and accompanying text *supra*.

152. *See* Commonwealth v. Moore, 353 A.2d 808, 811 n.5 (Pa. 1976) (since appellate counsel differed from trial counsel the issue of ineffective assistance of counsel was properly before the court); Commonwealth v. Graves, 238 Pa. Super. 452, 454, 356 A.2d 813, 814 (1976) (ineffective assistance of counsel claim can be raised on appeal if appellate counsel is different than trial counsel and the grounds upon which the claim is based appear in the trial record). *See also* Commonwealth v. Learn, 233 Pa. Super. 288, 335 A.2d 417 (1975), in which the court stated, "*Dancer* does not hold that ineffective assistance of counsel must be raised on direct appeal in every case. . . . [U]nder several circumstances such issue can only be raised in a PCHA hearing." *Id.* at 291, 335 A.2d at 418.

153. PA. STAT. ANN. tit. 19, §§ 1180-4(a)(1)-(3) (Supp. 1976).

154. 237 Pa. Super. 341, 352 A.2d 431 (1975).

155. The court was unwilling to place a defendant who does not test the appellate process in a better position than one who appeals with the assistance of new counsel but fails to raise the issue of ineffectiveness. *Id.* at 350, 352 A.2d at 436.

156. 460 Pa. 407, 333 A.2d 790 (1975).

157. The result in *Strachan* was based on the reasoning that it is "unrealistic to expect counsel to advise his client that he was ineffective or to expect a layman to ferret out instances of ineffectiveness without the assistance of counsel." *Id.* at 410, 333 A.2d at 791.

Boyer dissent persuasively argued that in regard to an ineffectiveness claim, there is no difference between failure to raise the issue in an uncounselled appeal and failure to raise it because no appeal is taken.[158] The dissent's approach appears to have prevailed—the supreme court recently held in *Commonwealth v. Mabie,*[159] that a failure to appeal after the defendant has consulted his trial counsel on the feasibility of an appeal does not preclude PCHA review of an ineffective trial counsel claim. The rationale of the holding was that it is unrealistic to expect counsel to file motions and advise an appeal challenging his own effectiveness.[160] A uniform application of this reasoning requires a ruling that, regardless of whether the defendant consults with trial counsel about appeal, failure to appeal does not waive an ineffective trial counsel claim unless the defendant has received objective guidance from other counsel on the issue.[161]

Although application of *Dancer*'s principles still requires refinement, its impact on the waiver doctrine and appellate procedure has been substantial. The significance of *Dancer* and *Twiggs* is that a large number of ineffective assistance claims, based on trial coun-

158. 237 Pa. Super. at 351, 352 A.2d at 436 (Hoffman, J., concurring and dissenting). Judge Hoffman felt that *Dancer* did not mandate the result reached by the majority and that *Strachan*'s rationale supported a finding of no waiver. He viewed the actions of the defendants involved in *Strachan* and *Boyer* as similar since both rejected the assistance of trial counsel or any other attorney.

159. 359 A.2d 369 (Pa. 1976). In *Mabie,* the defendant was convicted on April 23, 1974. Although he consulted his trial counsel about the feasibility of taking an appeal, none was made. On September 12, 1974, a PCHA petition was filed alleging instances of trial counsel's ineffectiveness. The defendant was not required to allege that trial counsel was ineffective in failing to take an appeal alleging his own ineffectiveness. Indeed, his chances for success on such a claim seem remote since the courts have consistently held that it is unrealistic to expect counsel to argue his own ineffectiveness on appeal. However, if counsel has failed to take an appeal on claims independent of his own ineffectiveness, a claim of ineffective assistance of counsel, based on his failure to appeal, will prevent waiver of PCHA review of those issues. *Cf.* Commonwealth v. Holmes, 364 A.2d 259 (Pa. 1976) (claim that counsel was ineffective in failing to take an appeal was an extraordinary circumstance precluding waiver of PCHA review of an inadequate guilty plea colloquy issue).

160. 359 A.2d at 371-72. *Cf.* Commonwealth v. Hawkins, 362 A.2d 374, 376 (Pa. Super. 1976) (failure to appeal does not waive PCHA review of ineffective trial counsel claim when trial counsel advised an appeal not be taken).

161. Whether or not the defendant has consulted his trial counsel on taking an appeal, he does not receive objective guidance on the ineffectiveness issue unless he is given advice from counsel other than trial counsel. Furthermore, it would seem unreasonable to require the defendant to seek independent advice on this issue, especially since he may not be aware of its existence.

sel's failure to properly preserve error, will be raised on appeal. The ultimate effect of this development appears to be the provision of appellate consideration of unpreserved errors, a result directly contrary to the rule of *Clair*.

C. *Circumvention of the Waiver Rule by Claiming Ineffective Assistance of Counsel*

Claims of ineffective assistance of trial counsel have provided a method for securing appellate review of issues supposedly precluded from such consideration by *Clair*'s waiver doctrine. To gain appellate review of an unpreserved issue, the appellant need only allege that counsel's failure to properly preserve the issue deprived him of effective assistance of counsel. While the courts are adamant in refusing to consider an unpreserved issue when directly presented for review, they will examine the merits of such an issue if an ineffective assistance of counsel claim is predicated upon a failure to preserve that issue. The nature and extent of the consideration afforded an unpreserved issue has been described as indirect[162] and only in relation to the ineffectiveness claim.[163] This only reflects the difficulty confronting the defendant in vindicating the error; it does not mean that the judicial burden will be alleviated.

The circular analysis in which the court in *Commonwealth v. Learn*[164] found itself is illustrative. In that case, the appellant raised issues on appeal which had not been included in post-verdict motions, contemporaneously claiming that counsel's failure to include them in post-verdict motions constituted ineffective assistance of trial counsel. The court first stated that the issues not included in post-verdict motions were precluded from appellate consideration by the waiver rule.[165] It then decided that it would have to determine if these same issues had merit in order to consider the ineffectiveness claim,[166] and explained:

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162. Commonwealth v. Fredericks, 235 Pa. Super. 78, 340 A.2d 498 (1975) (question not properly preserved below may be indirectly reviewable if counsel's failure to preserve it lacked a rational basis, and that question may be resolved on direct appeal if the record is adequate).

163. Commonwealth v. Robinson, 232 Pa. Super. 328, 334 A.2d 687 (1975) (claims that appellant had been denied a fair trial and the right to present alibi witnesses were waived, but would be considered in relation to an ineffectiveness claim).

164. 233 Pa. Super. 288, 335 A.2d 417 (1975).

165. *Id.* at 289-90, 335 A.2d at 418.

166. *Id.* at 291, 335 A.2d at 419.

> A lesson can be learned from this which could be useful to appellants who have failed to raise an issue in post-verdict motions. All such appellant [sic] need do in order to have such substantive issue considered by this court is simply raise the issue of ineffective assistance of counsel. The reason for such ineffectiveness of counsel would be the failure to raise the substantive issue in post-verdict motions. . . . One with a cynical view might conclude that the rule handed down in the waiver cases . . . is meaningless.[167]

Employing this analysis, the court must first examine the substance of the unpreserved claim to ascertain whether it is meritorious; if so, the court will then decide if counsel had a reasonable basis for failing to raise the issue. It is significant that, regardless of whether the outcome is favorable to the appellant, the reviewing court must always consider the merits of the unpreserved error.

This technique is equally applicable to obtain appellate review of unpreserved claims when the alleged ineffectiveness occurs at other stages of the trial proceedings. For example, in *Commonwealth v. Moore,*[168] because the defendant had failed to make a timely motion for a suppression hearing the court refused to consider whether the defendant's confession was involuntary. But in deciding whether counsel's failure to move for a suppression hearing amounted to ineffectiveness, the court had to determine whether the confession was in fact involuntary. The court could not decide from the record the truthfulness of the appellant's factual allegations; therefore, it remanded for an evidentiary hearing.[169] Similarly, when counsel's

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167. *Id.* at 291-92, 335 A.2d at 419. In *Learn,* if the court had found counsel ineffective in failing to raise the issues in post-verdict motions, it would have granted relief in accordance with the adequacy of the record. If the record is adequate to permit the court to determine the merits of the issues counsel failed to preserve, the reviewing court will decide them. If the record is inadequate, the reviewing court will remand to the trial court to allow the issues to be raised in post-verdict motions filed nunc pro tunc. *Cf.* Commonwealth v. Carter, 463 Pa. 310, 315, 344 A.2d 846, 849 (1975) (Roberts, J., concurring).

168. 353 A.2d 808 (Pa. 1976).

169. *Id.* at 811. *See also* Commonwealth v. Logan, 364 A.2d 266 (Pa. 1976). At trial, the defendant's motion to suppress incriminating statements as involuntarily given was denied and he was convicted. On appeal, the defendant only contested the sufficiency of the evidence, and the conviction was affirmed. At a subsequent PCHA hearing, the judge found that the confession should have been suppressed either as the fruit of an illegal arrest, or the product of an unnecessary delay. On appeal by the Commonwealth, it was held that the defendant had waived the claims relating to the admissibility of the incriminating statements by failing to raise them on direct appeal. But because these claims were accompanied by an

failure to object to a point during the trial results in the waiver of a claim, an allegation that such failure constitutes ineffectiveness will secure appellate consideration of the unaddressed point. This ploy has been used to gain appellate review of claims that the district attorney made prejudicial remarks and that the judge erred in his charge, even though the defendant made no objection to these alleged errors at trial.[170]

Since this device is not limited to securing appellate review of issues not preserved at trial, a claim of ineffective assistance of appellate counsel may be utilized to gain collateral review at PCHA proceedings of issues waived by failure to raise them on direct appeal.[171] This further erodes any economizing effect that the application of *Dancer*'s principles may have had. Whenever failure to comply with *Dancer* results in the waiver of an ineffective trial counsel claim on appeal, it may be alleged at a PCHA proceeding that appellate counsel was ineffective in failing to raise the ineffective trial counsel issue.[172] Furthermore, if the PCHA court's finding is appealed, the appellate court will ultimately review the ineffective trial counsel claim it originally refused to consider because it had been waived under *Dancer*.[173] As familiarity with the principles

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ineffectiveness claim the court extensively reviewed their merits to determine if counsel should have asserted them.

170. *See, e.g.*, Commonwealth v. Johnson, 344 A.2d 485 (Pa. 1975); Commonwealth v. Valle, 362 A.2d 1021 (Pa. Super. 1976) (after reviewing the merits of claim that the prosecutor had made prejudicial remarks, the court found that counsel's failure to object to them constituted ineffectiveness).

171. *See, e.g.*, Commonwealth v. Drummond, 238 Pa. Super. 311, 357 A.2d 600 (1976) (where counsel's failure to raise an issue on appeal precludes consideration of that issue, the defendant's remedy is an ineffectiveness of appellate counsel claim at a PCHA proceeding); Commonwealth v. Danzy, 234 Pa. Super. 633, 340 A.2d 494 (1975) (court considered the merits of the contentions contained in a PCHA petition to determine if counsel's failure to pursue them on appeal constituted ineffective assistance of appellate counsel).

172. *See* Commonwealth v. Jackson, 362 A.2d 324, 329 (Pa. Super. 1976). In *Jackson*, the appellant raised three instances of trial counsel's ineffectiveness, but they were not finally litigated and he was allowed to file a petition for PCHA relief on the ineffectiveness issue. The PCHA petition contained ten new instances of trial counsel's ineffectiveness. On appeal from the PCHA court's determination, the superior court held that *Dancer* precluded review of the ten new ineffectiveness claims because they had not been raised on appeal. Judge Hoffman believed that the majority had correctly applied *Dancer*'s principles. He pointed out, however, that the defendant could obtain review of the ten new allegations of trial counsel's ineffectiveness by retaining a fourth attorney and alleging in a second PCHA hearing that the attorney in the first PCHA proceeding was ineffective for failing to claim appellate counsel was ineffective because he did not specify more than three instances of trial counsel's ineffectiveness. *Id.* at 336 (concurring opinion).

173. If the ineffective assistance of counsel claim is founded on a failure to preserve trial

enunciated by the courts in this area grows, ineffective assistance of counsel will probably become a boilerplate claim included in every appellate brief to ensure review of unpreserved issues. Only the unwary lawyer will fail to secure consideration of unpreserved issues by not basing a claim of ineffectiveness on such issues.[174]

It appears, therefore, that the remedy for the difficulties caused by the fundamental error rule has in turn created the same problems. Appellate review of unpreserved errors may be secured by attaching an ineffectiveness claim to them in much the same manner as was accomplished by claiming such errors were fundamental. The court will have to make at least a cursory examination of the merits of the unpreserved issue in determining whether there was effective assistance of counsel. While it may be argued that this process avoids shifting the burden to the PCHA courts, a result some predicted *Clair* would produce, this is not a valid consideration. First, the objective of *Clair* was to lessen the burden on appellate courts, not PCHA courts. Second, it is probable that the present procedure will increase the appellate burden without appreciably lessening the workload of PCHA courts.

The least amount of time an appellate court is required to devote to a claim of ineffectiveness based on a failure to preserve error occurs when it determines such a claim from the record. This review would seem to require no more or less time than is involved in determining a claim of fundamental error. However, *Twiggs* requires that there be a remand for an evidentiary hearing when the claim cannot be decided from the record. Because ineffective assistance claims involve ascertaining counsel's purpose, such remands should be frequent. The result is that both the trial and appellate

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error, the result is even more paradoxical. The court will have to review an issue precluded from consideration by *Clair*, to determine an ineffective trial counsel claim waived under *Dancer*, to decide if appellate counsel was ineffective.

174. For example, in Commonwealth v. Carter, 463 Pa. 310, 344 A.2d 846 (1975), the court considered a contention that the defendant's waiver of a jury trial was invalid because it had been improperly accepted by the trial judge, even though the claim of impropriety was not included in post-verdict motions. The court reviewed the unpreserved invalid waiver issue to determine the defendant-appellant's claim that trial counsel had been ineffective in failing to preserve that issue. In contrast, in Commonwealth v. Banks, 350 A.2d 819 (Pa. 1976), the court refused to consider a similar claim when it was not included in post-verdict motions and no ineffectiveness issue was raised. In that case, the defendant claimed his waiver of jury trial was invalid because of an inadequate colloquy—an allegation capable of determination from the record. The court would not consider the merits of the claim because it had not been included in post-verdict motions.

courts participate in the adjudicatory process of ineffective assistance claims, whereas under a fundamental error analysis only the appellate court was involved. The problem is further compounded by the fact that both parties may appeal from the findings of the evidentiary hearing. This requires the appellate court to deal with the issue twice; under the previous practice of deciding the claim at a PCHA proceeding, the appellate court only dealt with the issue once.[175] One court, fully cognizant that an ineffectiveness claim would become available to the defendant if waiver of the substantive issue were found, felt judicial economy would be promoted by refusing to apply waiver.[176] The court reasoned that the procedure of reviewing the ineffectiveness claim was a "wasteful expenditure of judicial time," and it would be more expeditious to allow the defendant to directly raise the substantive issue on appeal.[177] Another deficiency in the present procedure is that the defendant can, as a practical matter, still choose whether to pursue relief on the ineffectiveness claim directly on appeal or collaterally at a PCHA proceeding.[178] The ultimate result is that appellate courts will be required to expend time and energy where no trial ruling has been made[179] and, in addition, will often be confronted with claims requiring factual findings before they can be decided.[180]

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175. The appellate court must first examine the record to determine if a remand is necessary. If there is a remand, and it is followed by an appeal, the appellate court must consider the case a second time.

176. Commonwealth v. Throckmorton, 359 A.2d 444 (Pa. Super. 1976). In *Throckmorton*, the court had to decide whether a defendant could initially make a motion to suppress at a retrial following appeal when the opportunity to make the motion existed at his first trial. The Commonwealth argued that failure to make the motion at the first trial precluded the motion at the second trial. The court refused to find a waiver because such a finding would have an adverse effect on judicial economy, contrary to the purpose of the waiver rule.

177. *Id.* at 447-48.

178. The appellant can determine when to first raise his ineffectiveness claim, on appeal or at a PCHA proceeding, simply by retaining or changing counsel on appeal. *See* text accompanying note 133 *supra*. An indigent can also make a determination by deciding whether to petition the court to appoint new counsel for appeal. Practically, an indigent is unlikely to make this decision on his own, but he could do so upon advice from the defenders association. Even if the defendant is represented by new counsel on appeal, he may obtain PCHA consideration of the ineffectiveness issue simply by failing to raise it on appeal, and claiming at a PCHA hearing that appellate counsel was ineffective for failing to preserve the ineffective trial counsel claim. *See* notes 171-73 and accompanying text *supra*.

179. This is the same deficiency found by the *Clair* court in the fundamental error doctrine and which necessitated its abrogation. *See* notes 22 & 23 and accompanying text *supra*.

180. To decide an ineffectiveness claim, the court must first determine the basis of counsel's action or inaction. Since the reason for counsel's conduct is unlikely to appear in the

The obvious questions raised by the preceding discussion are whether the court's review of unpreserved issues is any different when they are alleged to constitute ineffective assistance of counsel than when they were claimed to have been fundamental error, and if so, in what respect. Since an effective assistance of counsel claim does not appear to involve a more economical form of review than fundamental error, its use to address unpreserved error is only justified if the ineffectiveness claim is a more effective method to vindicate the rights of defendants prejudiced by unaddressed error. It appears that the court's application of the test to determine ineffective assistance of counsel is just as imprecise and arbitrary as the fundamental error test, and affords the defendant no greater protection.

D. The Present Ineffective Assistance Test

The proper test for ineffective assistance of counsel was set forth in *Commonwealth ex rel. Washington v. Maroney*:[181]

> [O]ur inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel has *some reasonable basis* designed to effectuate his client's interests. The test is *not* whether other alternatives were more reasonable, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decisions had any reasonable basis.[182]

If this test was literally applied to claims of ineffective assistance of counsel based on a failure to preserve an issue, the magnitude of any unpreserved error would be of peripheral importance. Despite the dimensions of an unpreserved error, counsel would be deemed effective if he had a reasonable basis for his failure to preserve the claim. But if it is determined that no reasonable basis existed for

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record, a hearing will be necessary to make this finding. *See also* Commonwealth v. Moore, 353 A.2d 808 (Pa. 1976) (court remanded for an evidentiary hearing to determine the veracity of appellant's factual allegations supporting claim that his confession was involuntary, and counsel's failure to preserve the claim was ineffective assistance).

181. 427 Pa. 599, 235 A.2d 349 (1967).

182. *Id.* at 604-05, 235 A.2d at 352-53 (emphasis in original).

counsel's failure to make a claim, the court would be compelled to grant the defendant relief, unless it could conclude that beyond a reasonable doubt the ineffectiveness of counsel was harmless error.[183] The magnitude of any error would be a relevant factor[184] in determining the reasonableness of counsel's conduct, and whether instances of ineffectiveness were harmless error or not. Unless counsel's ineffectiveness did not cause *any* prejudice[185] to the defendant beyond a reasonable doubt, the defendant would be entitled to the appropriate relief.[186]

If this approach to an ineffective assistance claim were in fact taken, it would materially differ from the fundamental error test since counsel's conduct rather than the degree of prejudice resulting from the unpreserved claim would be of central importance. But it is suggested that the courts are primarily concerned with the degree of prejudice resulting from counsel's conduct, and will rarely find ineffectiveness where counsel's failure to preserve a claim did not significantly prejudice the defendant. While perhaps it is practical, this approach is inconsistent with the *Washington* test. More importantly, when the ineffectiveness issue is decided without the benefit of an evidentiary hearing, it is subject to the same arbitrary decision-making which characterized the fundamental error analysis.

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183. *See* Chapman v. California, 386 U.S. 18 (1967) (denial of a constitutional right is not harmless error unless the court finds it harmless beyond a reasonable doubt); Commonwealth v. Washington, 361 A.2d 670 (Pa. Super. 1976) (trial counsel's failure to take appropriate action had no reasonable basis since it was not certain his failure was harmless beyond a reasonable doubt); *cf.* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 293-95 (1964) (Constitution requires the assistance of counsel whose quality of performance does not fall below a certain level).

184. The primary consideration would be counsel's reason for failing to make a particular claim or object to error. The reasonableness of his action or inaction would be measured against the alternatives available to counsel, existing trial circumstances, and the degree of prejudice which was likely to have occurred from a failure to preserve an issue.

185. Glasser v. U.S., 315 U.S. 60, 76 (1941) ("right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial"). *See* Finer, *supra* note 120, at 1093. The author suggests that any ineffective assistance of counsel "test which requires a certain degree of prejudice places minimal importance on the right to counsel." *Cf.* Chapman v. California, 386 U.S. 18, 52 n.7 (1967) (Harlan, J., dissenting). Justice Harlan noted that the Supreme Court has always recognized that particular kinds of error as a matter of law cannot be found to be harmless. In his view, the denial of the right to counsel was this kind of error.

186. The determination of appropriate relief would depend on the stage of the proceeding at which counsel was deemed ineffective. Generally, if the ineffectiveness occurs at a post-verdict stage of the proceeding, a new trial would not be required.

While the process is far from complete, the courts appear to be developing a two-step inquiry to determine whether counsel's failure to preserve an issue constituted ineffective assistance of counsel. First, after examining the merits of the unpreserved issue, the court decides whether the fact that the claim was not made significantly prejudiced the defendant at trial. Absent such a finding, regardless of how irrational counsel's failure to preserve the issue is, the court will not grant relief on the ineffectiveness claim.[187] At this point, the court is solely concerned with the degree of error the unpreserved claim is founded upon,[188] an inquiry very similar to the fundamental error analysis. This approach is prevailing[189] despite arguments that it is not necessary to determine whether action by counsel would have succeeded when deciding if the failure to take such action had a reasonable basis.[190] The result is that the reasonable basis test and its "meaningfulness" requirement which prompted the *Clair* court to substitute it for the fundamental error analysis,[191] is not applied unless an examination similar to fundamental error is first made. The outcome of this first step of the inquiry will vary, depending on the particular court's estimation of the degree of prejudice that counsel's failure to make such a claim caused the defendant. The inconsistency such an approach will inevitably engender can only be aggravated when the court determines the effect of a failure to make

187. *See* Commonwealth v. Gilmore, 347 A.2d 305 (Pa. 1975) (Manderino, J., dissenting). Justice Manderino protested what he felt was an attempt by the majority to substitute sub silentio a new ineffective assistance of counsel test for that set forth in *Washington*. Under the new test, there would be no finding of ineffective assistance of counsel "if the action—or inaction—complained of would not have *required* the opposite result at trial." *Id.* at 311 (emphasis in original). In Justice Manderino's view, this test would make it nearly impossible to obtain a new trial on the grounds of ineffective assistance of counsel.

188. *See, e.g.*, Commonwealth v. Badger, 238 Pa. Super. 284, 357 A.2d 547 (1976). The defendant claimed trial counsel was ineffective for failing to request the judge to recuse himself. The appellate court stated that before it could conclude that counsel's inaction was ineffective, it was necessary to decide whether a refusal to recuse was reversible error.

189. *See, e.g.*, Commonwealth v. Boyd, 461 Pa. 17, 334 A.2d 610 (1975) (since under the totality of the circumstances test the fact of prolonged questioning is insufficient by itself to establish the involuntariness of a confession, trial counsel's failure to make a motion to suppress on this theory did not constitute ineffectiveness); Commonwealth v. Dever, 364 A.2d 463 (Pa. Super. 1976) (even if counsel's failure to object to the Commonwealth's motion was the result of neglect, it does not constitute ineffectiveness).

190. 234 Pa. Super. 93, 101 n.4, 338 A.2d 593, 597 n.4 (1975) (Hoffman, J., dissenting) (in determining if failure to make a motion to suppress constituted ineffective assistance of counsel, it is unnecessary to decide if the motion would have been meritorious if promptly filed).

191. 458 Pa. 418, 422, 326 A.2d 272, 274 (1974).

a claim from a record not designed to enable this determination.[192]

Even the second step of the inquiry, which is purportedly an application of the reasonable basis test, is susceptible to manipulation by the reviewing court. Whenever the court determines the reasonableness of counsel's failure to preserve a claim from the trial record, which rarely reveals the motivations of counsel, the outcome must be at least partially dependent on the predilections of the court. For example, a court desiring to grant relief may hold that failure to object to reversible error at trial,[193] or to raise reversible error on appeal,[194] cannot possibly have a reasonable basis and necessitates no evidentiary hearing. Conversely, a court not so favorably inclined may speculate about a conceivable reasonable basis; finding some basis, the court may either deny the ineffectiveness claim[195] or remand for an evidentiary hearing.[196] Since there may conceivably exist a reasonable basis for a failure to make any claim, an appellate court exercises a wide degree of discretion even in

192. For an example of individual justices' disagreement on the degree of prejudice caused by counsel's failure to preserve an error see Commonwealth v. Logan, 364 A.2d 266 (Pa. 1976) (reversing PCHA court's finding that no reasonable basis existed for counsel's failure to make a suppression motion).

193. *See* Commonwealth v. Johnson, 463 Pa. 185, 344 A.2d 485 (1975) (Manderino, J., dissenting) (trial counsel's failure to object to prosecutor's prejudicial remarks and judge's erroneous jury charge was ineffective assistance of counsel since both were reversible error).

194. Commonwealth v. Danzy, 234 Pa. Super. 633, 340 A.2d 494 (1975) (no conceivable reasonable basis for failing to raise a meritorious issue on appeal).

195. Commonwealth v. McCoy, 232 Pa. Super. 477, 334 A.2d 684 (1975), presents a good example of this approach. In *McCoy*, defendant's counsel moved for a mistrial, but the motion was denied by the trial judge on the grounds it was not timely made. Defendant subsequently filed a PCHA petition alleging trial counsel had been ineffective by failing to make a timely motion for a mistrial. The PCHA court, without hearing any testimony from trial counsel, denied the petition. On appeal from this denial, the court affirmed, speculating about possible reasonable bases that counsel may have had in delaying his motion. *Id.* at 481, 334 A.2d at 686; *cf.* Commonwealth v. Nole, 461 Pa. 314, 336 A.2d 302 (1975) (failure to object to an erroneous jury charge was not ineffective assistance because counsel *may* have believed the charge was to the appellant's advantage).

196. *See* Commonwealth v. Green, 234 Pa. Super. 236, 338 A.2d 607 (1975). In *Green*, the trial record showed that the colloquy preceding a guilty plea was inadequate and clearly reversible error. Trial counsel did not appeal the invalid colloquy issue; the defendant claimed this failure constituted ineffective assistance of counsel. The court agreed that if the inadequate colloquy issue had been raised a new trial would have been granted, but decided that this in itself did not mean counsel had been ineffective. The court remanded for an evidentiary hearing to determine the basis for counsel's failure to appeal the reversible error and suggested that one reasonable basis for not appealing reversible error was a belief by counsel that a new trial would result in conviction and the imposition of a greater sentence. *Id.* at 240, 338 A.2d at 609.

deciding whether or not to remand.[197] Practically, if the court remands after it has decided counsel's failure to preserve a claim was prejudicial, the defendant's chances for successful relief become more remote.[198]

The test now employed by the courts is similar to review of fundamental error—the appellate court will only grant relief once it decides counsel's failure to preserve a claim sufficiently prejudiced the defendant. If the degree of prejudice is thought to be insignificant, the court will likely determine that counsel had a reasonable basis for not making a claim or objecting to error. If doubt exists, the court can remand for an evidentiary hearing. Regardless of the outcome, the result is necessarily dependent on the amount of prejudice the court feels that counsel's conduct caused. There have been recent opinions so preoccupied with the degree of error and amount of prejudice that not even lip service was paid to the reasonable basis inquiry.[199] The present test probably does differ

197. *Cf.* Commonwealth v. Danzy, 234 Pa. Super. 633, 340 A.2d 494 (1975) (there can be no conceivable basis for failing to raise reversible error on appeal); Commonwealth v. Green, 234 Pa. Super. 236, 338 A.2d 607 (1975) (whether failure to raise reversible error by appeal constitutes ineffective assistance depends on whether there was a reasonable basis for counsel's conduct). A court can rarely be certain without an evidentiary hearing that there is no reasonable basis for a failure to preserve an issue, but courts often decide no remand is necessary in instances where other courts have remanded.

198. Once there is a remand for an evidentiary hearing, the outcome is susceptible to control by the claimed ineffective attorney. *See* Lee, *Right to Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277, 295 (1974) ("counsel has a distinct interest in coloring his testimony"); Finer, *supra* note 120, at 1079 ("many acts and omissions may be argued about reasonably by skillful lawyers").

199. *See* Commonwealth v. Ramos, 364 A.2d 257 (Pa. 1976). In *Ramos*, the defendant entered a guilty plea to murder. No appeal was taken, but a PCHA petition alleging the involuntariness of the guilty plea and the ineffectiveness of counsel was filed and denied. On appeal from this denial, the supreme court reversed, finding the guilty plea invalid because of an inadequate colloquy. The court stated that the ineffectiveness claim in the PCHA petition prevented counsel's failure to appeal the trial conviction from waiving the involuntary plea issue. The court did not make a reasonable basis analysis or consider counsel's alleged ineffectiveness; it limited its inquiry to the merits of the involuntary plea issue. *But cf.* note 196 *supra*. This was not a situation in which the on-the-record adequacy of the colloquy might have been first challenged on appeal; in *Ramos* no appeal from the trial conviction was taken. *See* notes 97 & 98 and accompanying text *supra*. Suggesting that the court is de-emphasizing the ineffectiveness analysis in favor of direct review of the unpreserved error, the court in *Ramos* only stated that an ineffectiveness claim was made. It is uncertain whether the defendant alleged counsel was ineffective for failing to appeal the involuntary plea issue—the only proper reason for the court to review the adequacy of the colloquy. There is an indication, however, that the ineffectiveness claim was not grounded on this failure. *Id.* at 257 n.2. *See also* Commonwealth v. Stanton, 362 A.2d 355, 359 (Pa.

in effect from the fundamental error test, to the extent that the defendant has less of an opportunity for relief under the present analysis. The prosecution may first contend that counsel's failure to preserve a claim did not greatly prejudice the defendant; if this argument is unsuccessful, it may then argue the existence of a reasonable basis[200] for counsel's action. This is a distinct advantage to the prosecution since any ineffective assistance standard implies a presumption in favor of finding competence of counsel.

The objective of the preceding discussion is to emphasize that the validity of an ineffectiveness claim must turn on the reasonableness of counsel's assistance. To allow the courts to speculate on the reasonableness of counsel's conduct, which they usually must do when determining an ineffectiveness claim from the trial record, will only result in inconsistent decision-making. Such speculation is just as arbitrary and unguided as was the fundamental error analysis.[201] This uncertainty can only be enhanced when a court states that it is applying an ineffectiveness test, but actually applies a different

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Super. 1976) (Hoffman, J., dissenting). In *Stanton*, it was claimed on appeal that trial counsel was ineffective for failing to object to an erroneous jury charge. Judge Hoffman stated that the "precise question involved" was whether the jury charge was erroneous. He felt that the charge failed to inform the jury of the law and counsel was ineffective for failing to object. The opinion is devoid of any reasonable basis language. Judge Hoffman's analysis makes the outcome of a case entirely dependent on whether the unpreserved error was reversible.

The majority in *Stanton* did not consider the ineffectiveness claim because it was first raised in the appellant's reply brief. The dissent would have considered the issue. *Id.* at 358 n.3. In a separate dissenting opinion, Judge Spaeth would have also given relief to a co-defendant even though his appellate brief only alleged the jury charge constituted fundamental error. In Judge Spaeth's view, when both attorneys for codefendants were incompetent for failing to preserve the record, and on appeal the new attorney for one defendant points out the error and wins a new trial, it did no great violence to *Clair* or *Dancer* to award the other defendant a new trial. *Id.* at 365 (dissenting opinion).

200. *See* notes 192-98 and accompanying text *supra*.

201. *Cf.* Commonwealth v. Logan, 364 A.2d 266 (Pa. 1976); Commonwealth v. Ramos, 364 A.2d 257 (Pa. 1976). In *Logan*, the court held counsel was not ineffective for failing to claim a confession should have been suppressed as the result of a violation of PA. R. CRIM. P. 130. This was because the court had not yet held that a confession resulting from an unnecessary delay was inadmissible, and counsel could not be expected to predict the remedy a court would deem appropriate for a violation of rule 130. *Id.* at 270.

In *Ramos*, the court apparently held counsel ineffective for failing to claim the colloquy was inadequate because of the holding in Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974). Yet *Ingram* was not decided until after counsel in *Ramos* had failed to make a timely appeal on the claim. If counsel was ineffective it was because he failed to predict not the remedy, but the violation itself. *Cf.* note 62 *supra*. *Logan* and *Ramos* were decided on the same day. For the reason this writer describes the *Ramos* court as "apparently" holding counsel ineffective for failing to make the inadequate colloquy claim, see note 199 *supra*.

test. The proper forum for dealing with a claim of ineffective assistance of counsel is at a PCHA hearing.[202] There counsel may explain, and the defendant question, counsel's failure to raise a particular issue. If an appeal is taken from the finding of the PCHA hearing, the appellate court may determine the claim from a record designed to disclose the actual basis of counsel's conduct. The court would not be forced to speculate, from its reading of a trial record, about the basis of counsel's conduct. More importantly, the appellate court will be able to de-emphasize review on the merits of unpreserved issues and avoid the consumption of time that subversion of the waiver rule causes.

V. *Clair* IN RETROSPECT: ITS OBJECTIVES AND EFFECT

The twofold purpose of *Clair* was to increase judicial economy without decreasing the protection of the defendant's rights. It is argued that the objectives of *Clair* have remained unfulfilled and its reasoning has been frustrated. *Dancer* and its progeny, which define the timing of raising an ineffective assistance of counsel claim, are a greater cause for the failures of the waiver rule than any inherent weakness in *Clair*'s logic. That *Clair*'s purpose has not been accomplished is not to say that the waiver rule has not had an effect on appellate review. Rather, the doctrine which has developed has complicated the process of review by encouraging subterfuge without providing the defendant with an effective remedial device. The subsequent interpretation of *Clair* in regard to the specificity and form required to preserve an issue has made nearly all appellate issues susceptible to a waiver argument.[203] No matter how specific

202. *See, e.g.*, Commonwealth v. Hawkins, 362 A.2d 374 (Pa. Super. 1976). In *Hawkins*, the defendant claimed on appeal that trial counsel had been ineffective in failing to object that an in-court identification had been tainted by a previous one-on-one station house identification. The majority found counsel effective, determining from the record that the admittedly improper station house identification did not taint the in-court identification. *Id.* at 377. Judge Spaeth concluded that the hearing judge who had received testimony on the issue should decide whether the identification was tainted. He felt that an appellate court could not properly decide the issue by reviewing a fragmentary record compiled for another purpose. *Id.* at 377 (concurring opinion). *See also* Commonwealth v. Learn, 233 Pa. Super. 288, 294, 335 A.2d 417, 420 (1975) (Spaeth, J., concurring). Judge Spaeth felt the only way to accurately and fairly determine an ineffective assistance of counsel claim was to conduct an evidentiary hearing. Then counsel could respond to questioning on the purpose of his action or inaction.

203. There may be many instances where counsel's formulation of an allegation of error,

the allegation of error, a clever prosecutor will be able to formulate it more specifically and argue the defendant waived the issue by failing to state it similarly. However, a flexible approach by the courts, avoiding rigid conceptual rules, would avoid this difficulty by discouraging meritless waiver arguments. The more serious problem is that even when a valid waiver argument is successfully made, *Dancer* will likely cause the court to review the merits of the waived issue in the context of an ineffectiveness claim. This is not to imply the defendant pays no price by failing to preserve the issue below, since his chances for obtaining relief under an ineffectiveness analysis appear to be not nearly as great as when the court simply decides whether an error is reversible. Thus, the waiver rule that has evolved since *Dancer* neither saves the courts time nor increases protection of the rights of the defendant.

Undoubtedly, a tension exists between protection of the defendant's rights and the necessity for judicial economy. While perhaps the competing interests are not perfectly reconcilable, the supplementation of *Clair* with *Dancer* falls far short of achieving the optimum balance. *Clair* and *Dancer,* in an attempt to satisfy both the ends of fairness to the defendant and the orderly judicial administration of claims, have distorted the judicial process. The effect is that the courts review unpreserved claims in the questionable context of an ineffectiveness issue, and apply an improper test to determine whether the defendant should be granted relief.

A proper adjudication of a claim of ineffective assistance of counsel generally requires an evidentiary hearing to determine the actual basis of counsel's conduct. Therefore, it is suggested that all ineffectiveness claims should be initially raised by petition to a PCHA court. This will not cause needless hearings on meritless ineffectiveness claims; the PCHA provides that a hearing may be denied if the claim is "frivolous and without any support from the record."[204] Even if such a procedure results in shifting the burden to PCHA courts from which appeal may be taken, at least this will insure that

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though not perfect, is sufficient to preserve the claim. Since the prosecution has nothing to lose and everything to gain, it will likely argue waiver on the grounds that the allegation was not adequately specific or timely.

204. PA. STAT. ANN. tit. 19, § 1180-9 (Supp. 1976). This section generally provides that a hearing may be denied on a PCHA petition if its allegations are patently frivolous and unsupported by the record or from other evidence submitted by the petitioner. *See also* Commonwealth v. Laboy, 460 Pa. 466, 333 A.2d 868 (1975).

the correct criteria will be applied to determine the claim. Moreover, the increase in the burden borne by PCHA courts will not be as great as the corresponding decrease in the appellate case load since the PCHA courts currently deal with a substantial percentage of these claims on remand, and the appellate court will no longer have to deal twice with the same claim.[205]

Some may argue that *Dancer* has promoted judicial economy by eliminating the previous practice of pursuing PCHA relief on an ineffectiveness claim shortly after or simultaneously to raising all other cognizable issues on appeal. However, *Clair*'s waiver rule would significantly diminish the difficulties caused by this prior practice without the aid of *Dancer*; in many instances the application of the waiver rule will result in no other issues being cognizable on appeal. If all ineffectiveness claims are required to be first raised in a PCHA proceeding, the defendant will be without any device to secure appellate review of unpreserved issues.[206] Since many appeals involve no issues independent of the ineffectiveness claim, this should diminish the number of direct appeals.[207] In instances where the defendant has allegations cognizable on direct appeal separate from his ineffective assistance claim, *Dancer* does not prevent him from taking an appeal and separately pursuing PCHA relief on the ineffectiveness claim. The defendant can often manipulate the factors which determine where the ineffectiveness claim will be initially raised.[208] Furthermore, even when a claim of ineffective trial

205. If an ineffectiveness claim is initially raised on appeal, the court will have to examine the record to decide if it is adequate to allow determination of the claim. If the record is inadequate, the court must remand for an evidentiary hearing, and then may likely be faced with the same claim on an appeal from the evidentiary hearing. *See* notes 137-41 and accompanying text *supra*.

206. An issue not properly preserved below will be truly waived for purposes of appeal. The defendant will not be able to gain direct review by predicating an ineffective assistance claim on counsel's failure to preserve the issue on appeal. If an appeal is taken from the PCHA court's adjudication of the ineffectiveness claim, the appellate court will be able to confine its inquiry to determining the reasonableness of counsel's conduct from the record of the PCHA court. The appellate court will not have to extensively analyze the merits of the unpreserved claim as is required when it attempts to make this determination from a trial record.

207. *See, e.g.*, Commonwealth v. Logan, 364 A.2d 266 (Pa. 1976). By asserting ineffective assistance of counsel, the defendant was able to make seven separate challenges to the validity of his confession, all of which would have been precluded from consideration but for the ineffectiveness claim. *See also* Commonwealth v. Learn, 233 Pa. Super. 288, 335 A.2d 417 (1975) (two claims relating to error by the trial judge were waived, but had to be considered to determine a third claim of ineffective assistance of counsel).

208. *See* note 178 and accompanying text *supra*.

counsel is waived under *Dancer*, PCHA relief is available for the corresponding ineffective assistance of appellate counsel claim which will always arise.

If appeal is taken from the PCHA court's adjudication of the ineffectiveness claim, the appellate court will be considering the reasonableness of counsel's conduct from the record of a factual hearing designed to determine this question. The record will provide the arguments of the parties and the lower court's opinion on the ineffectiveness issue.[209] The appellate court will not need to extensively review the trial record to determine the degree of any existing error, or speculate on the possible motivations of counsel. There is a special need for a prior hearing on the ineffectiveness issue since the resolution of an ineffective assistance claim generally demands factual findings not disclosed by the trial record. For these reasons, initial review of an ineffectiveness claim should be made by a PCHA court.

R. JEFFREY BEHM

209. An evidentiary hearing on the ineffectiveness issue would serve many of the same functions that post-verdict motions serve in regard to other issues. *Cf.* Commonwealth v. Carter, 463 Pa. 310, 313, 344 A.2d 846, 848 (1975) (explaining rationale for requiring issues to be raised in post-verdict motions). The burden that hearing post-verdict motions places on trial courts has not been so great as to suggest a necessity for their elimination.